LEGAL ASPECTS OF THE MARKETING OF ZAMBIAN COPPER

by

FREDERICK MWANSA NG'ANDU

LL.B (University of Zambia), LL.M (New York University)

Thesis presented for the
Internal Degree of Doctor of Philosophy
in the Faculty of Laws of the University of London.

School of Oriental and African Studies

April, 1985.

ABSTRACT

This thesis examines the legal problems affecting the marketing of Zambian copper. In this respect, the thesis seeks to discover the real causes of copper price instability and the effectiveness of international legal principles and institutional measures employed in an attempt to reduce such instabilities. A study of this nature, demands a careful scrutiny of the various legal and institutional mechanisms governing the marketing of copper and international measures designed to regulate such arrangements.

To this effect, chapter one of the thesis provides an introduction which seeks to set out in general terms, the nature of the problems faced in the marketing of copper. These problems are then examined in relation to their effect on the Zambian economy in general.

Chapter two, examines the background and development of the Zambian mining industry with a view to highlighting the genesis of the copper marketing system employed by Zambia. Discussed in this chapter are issues relating to mineral rights, mineral taxation, and measures aimed at the control of the production process.

In chapter three an attempt is made to examine the rules and institutional organization of the most important copper marketing and price setting institution - the London Metal Exchange.

Chapter four, examines one of the intergovernmental machinery employed to tackle the problems of commodity price

instability and the possible application of its principles to copper.

Chapter five, evaluates the United Nations Common Fund which is designed to support the international commodity agreement mechanism. Of prime concern in the analysis is to discover how far its principles may go in supporting a possible international copper agreement.

Chapter six is devoted to a discussion of one of the existing intergovernmental mechanism for the stabilization of copper prices. The discussion centres on the role and effectiveness of the Intergovernmental Council for Copper Exporting Countries (CIPEC).

The second existing intergovernmental approach to price stabilization is discussed in chapters seven and eight. This approach involves some form of international financial support machinery which may allow developing countries that produce copper to maintain their export earnings even when demand or prices decline. There are two such schemes operating at the moment and chapter seven is devoted to one scheme which is operated by the International Monetary Fund. Chapter eight examines the second scheme operating under a treaty of co-operation between the EEC countries on the one hand and ACP countries on the other.

Chapter nine suggests an alternative approach to the problem of stabilization of copper prices. This approach involves the creation of a Southern African mineral marketing corporation that could act as a sole mineral marketing agency for countries in the sub region associated under

Southern African Development Co-ordinating Conference (SADCC).

The final chapter provides a summary of conclusions.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

In conducting my research and the preparation of this thesis, I received encouragement and assistance from a number of persons and institutions. I am greatly indebted to all of them. But specifically I wish to record my sincere appreciation to Dr. P. Slinn, my supervisor without whose guidance, patience, and stimulation this work might not have been completed.

I also owe a great debt of gratitude to Professor F. Parkinson of the University College of London who willingly let me attend his LL.M. class in International Economic Law. The discussions in his class provided me with a lot of inspiration in my work.

Other gratitudes go to the staff at the London Metal Exchange, Mr. Kataya who is the former research manager of MEMACO Services Limited London, and Mr. Parkinson the Director of Marketing Policy at the CIPEC Secretariat. The discussions I had with them and the materials they provided were an eye opener and proved extremely relevant and useful. I also wish to express my gratitude to the officials at the offices of the International Cocoa Organization, the International Coffee Organization, and the International Tin Council in London who provided me with invaluable assistance in my research.

The officials of the following libraries gave every possible assistance: Institute of Advanced Legal Studies, School of Oriental and African Studies, the institute of

Commonwealth Studies and London School of Economics. I am indebted to them all.

My sincere thanks go to the University of Zambia which provided me with a scholarship that enabled me to carry out this study.

The typing of this thesis has been completed under considerable pressure owing to the time factor involved. For the speedy and efficient typing, I am indebted to Stephanie Usiskin.

Last but by no means least, I wish to dedicate this work to my wife Sophie and our two children Lombe and Mwansa without whose understanding and tolerance this work would just have been a dream. May God bless them.

TABLE OF CASES

1. Castillo v. Zallas. International Law Review, 1955, 22
2. Certain Expenses of the United Nations. ICJ Reports, 1962.
3. Chorzow Factory case. PCIJ Reports, series A, nos. 7, 9, 17, 19, 1926-29
4. Competence of the General Assembly for the admission of a state to the United Nations. ICJ Reports, 1950
5. Conditions of admission to membership in the United Nations. ICJ Reports, 1948
6. Legal consequences for states of the continued presence of South Africa in South West Africa (Namibia). ICJ Reports, 1971, p.4, Advisory opinion.
7. Frontier between Turkey and Iraq. Advisory opinion, 21st November 1925, PCIJ Reports, series B, number 12, 1925, page 31
8. Knight and Searl v Dove. (1964) 2 QB, page 631
9. Larsen v. Anglo-American Oil Company Ltd. (1924) 20 LL.L. Reports, page 39
10. Clarkson Booker Ltd. v. Andjel [1964] 2 Q.B. 775.
11. Northern Pacific Railway Company v. United States. 356 USI, 5, 78s. Ct. 514-518, 2L.Ed., 1958
12. Reparation for injuries suffered in the service of the United Nations. ICJ Reports, 1949, page 179
13. South West Africa case (second phase). ICJ Reports, 1966
14. The Barcelona Traction, Light and Power Company (Belgium v. Spain). ICJ Reports, 1970, p.7
15. The diversion of the waters of river Meuse (Netherlands v. Belgium) PCIJ Reports, Series A/B, number 70, 1937, page 77
16. The United States v. Aluminium Company of America. 148F, 2d. (Sd. cir. 1945) page 416
17. Fisheries jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland) (Merits). ICJ Reports, 1974

18. North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands). ICJ Reports, 1969, page 3 etc.

TABLE OF INTERNATIONAL AGREEMENTS

1. Agreement establishing the International Bauxite Association.. 13 International Legal Materials 1974; 1245
2. International Cocoa Agreement 1980. UNCTAD Doc. TD/ COCOA.6/7, 21st November 1980
3. Agreement establishing the African Development Bank, signed at Khartoum, Sudan, on 4th August 1963. UN Doc. E/CN.14/ADB/36 (UN Publ. 64.11.K.5)
4. Agreement establishing the Intergovernmental Council of Copper Exporting Countries (CIPEC), updated version, CIPEC Doc. CM/102/77 Fin, Paris, 3rd July 1981
5. Agreement establishing the Common Fund for Commodities, UN Document TD/IPC/CONF./L.15 of June 26, 1980
6. International Coffee Agreement 1976. Published by the International Coffee Organization, January 1976, London
7. Treaty for the establishment of the preferential trade area for Eastern and Southern African States. Published by the United Nations Economic Commission for Africa, 1981
8. Treaty on Air Transport in Africa - establishment of Air Afrique, Yaoundé, 1961, International Civil Aviation Organization Circular of 1970
9. International Development Association articles of agreement. Reprinted in 1970 by IBRD, Washington DC
10. Convention of Association between the European Economic Community and the African and Malagasy states associated with that community, signed at Yaounde, Cameroon, 20th July 1963. Full text in Louis B. Sohn (ed.), Basic documents of African Regional Organizations, volume IV, Oceana publications, 1972, page 1540
11. Convention of Association between the European Economic Community and the African and Malagasy states associated with that community, signed at Yaounde, Cameroon,

29th July 1969. Text in Louis B. Sohn (ed.), Basic documents of African Regional Organizations, vol. IV, p. 1691

12. The Sixth International Tin Agreement. Distributed by UNCTAD, Doc. TD/TIN.6/14, 6th July 1981

13. International Coffee Agreement 1983. Distributed by the International Coffee Organization, London, 1982

TABLE OF STATUTES

Zambia:

Calculation of taxes (consequential provisions) Act, CAP.669
Constitution of Zambia, 1964
Income tax (special provisions) Act, Act no. 32 of 1970
Mines Acquisition Act, CAP.601
Mineral Tax Act, Act no. 27 of 1970
Mines and Minerals Act, Act no. 32 of 1976
Lands Acquisition Act, CAP.296
Pioneer Industries (relief from income tax) Act, CAP.666
Amalgamation of Mining Companies (special provisions) Act, 1982
Northern Rhodesia Mining proclamation of 1912
Mineral tax (amendment) Act, Act no. 9 of 1979
The Prescribed Minerals and Materials Act, Act no. 28 of 1976
The Northern Rhodesia Mining Ordinance of 1958

Zimbabwe:

The Mineral Marketing Corporation of Zimbabwe Act of 1982. Unnumbered
The Zimbabwe Mining Development Corporation Act of 1982. Unnumbered
Southern Rhodesia Mines and Minerals Ordinance, 1903

Malawi:

The Mines and Minerals Act. Act no. 1 of 1981

Botswana:

De Beers Botswana Mining Company Agreement Act, 1970
The Bamangwato Concession Ltd. Mining Lease Act, 1970
The Mines and Minerals Act, Act no. 30 of 1976

Federation of Rhodesia and Nyasaland:

The Territorial Revenue (income tax and customs duties) distribution Act, 1954

TABLE OF ABBREVIATIONS

AAC	Anglo-American Corporation
ACP	Organization of African, Caribbean and Pacific countries
ADB	African Development Bank
BSA	British South African Company
CF	Common Fund
CIPEC	Intergovernmental Council of Copper Exporting Countries
ECA	Economic Commission for Africa
EDF	European Development Fund
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development (often referred to as the World Bank)
ICO	International Commodity Organization
IDA	International Development Association
IFC	International Finance Corporation
IMF	International Monetary Fund
IPC	Integrated Programme for Commodities
ITO	International Trade Organization
LAFTA	Latin American Free Trade Association
LME	London Metal Exchange
MEMACO	Metal Marketing Corporation of Zambia Ltd
NCCM	Nchanga Consolidated Copper Mines
NIEO	New International Economic Order
OAU	Organization of African Unity
OPEC	Organization of Petroleum Exporting Countries
OECD	Organization for Economic Cooperation and Development
RCM	Roan Consolidated Mines
RST	Roan Selection Trust
SADCC	Southern African Development Co-ordinating Conference
SDR	Special Drawing Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

ZCCM	Zambia Consolidated Copper Mines
ZIMCO	Zambia Industrial and Mining Corporation

CHAPTER ONE

INTRODUCTION

I. Sovereign Equality and Economic Relations between States

Classical international law has since the early days been concerned with those rules and institutions that sought to promote the common interest of all states. In this respect, Professor Higgins pointed out some years ago that the continuing function of international law is to seek "to establish what is the common interest and to base itself upon it."[1]

The preoccupation of the family of nations in the early part of this century has been peace and justice. The aims of the United Nations therefore, reflect the desire of war-weary nations to avoid future military confrontations - the main aim of the UN is to maintain international peace and security.[2] The major portion of the charter therefore, deals with the instruments and methods for implementing this objective. For example, Chapter VI is devoted to methods of peaceful settlement of disputes, and Chapter VII outlines measures to be taken in the more serious situations involving threats to the peace, breaches of the peace, and acts of aggression.

---

1. R. Higgins, Conflict of interests (1965), p.7.
2. See preamble to the UN Charter.

This desire for peace has helped perpetuate and reinforce a well established principle of international law - that of sovereign equality of states. This principle calls for equality of treatment of all states regardless of their actual strength and non-discrimination as between individual states or groups of states. Complimenting this principle, is the principle of universality - requiring all rules of international law to be reciprocally applicable to all states.[3]

Since the United Nations Charter came into being in 1945, matters of economic relations between states have assumed significant importance as is evident from the numerous United Nations resolutions on the subject. The economic concerns and objectives expressed in these resolutions have made the application of the principle of sovereign equality applicable to economic relations between states.

The application of the principle of sovereign equality to matters of international economic relations has mainly taken place through traditional international legal processes. These processes have included the conclusion of multilateral treaties, bilateral treaties, international conventions, and the creation of an interrelated network of regional and global economic institutions.

The experience of the past three decades however, has revealed serious shortcomings in the ability of these

---

3. For discussion on sovereign equality, see J.L. Brierly, The Law of Nations - an introduction to the international law of peace. (1963) Oxford at the Clarendon press, p.7.

processes in assuring an equitable system for the marketing of primary commodities. A lot of criticism has been voiced in relation to institutions and norms employed in the marketing of such commodities, particularly by developing countries who tend to be particular victims of their operations. The reasons for these criticisms are numerous and well documented by international lawyers, political scientists, and economists alike.[4]

II. The problem of commodity marketing

One of the major criticism made by developing countries about the existing commodity marketing systems relates to the organization, control, and the rules employed on international commodity markets. In this respect the criticism has two dimensions. In the first place, it is pointed out that the nature of these institutions and the rules they employ have tended to result in prices of primary commodities upon which many developing countries depend to show more short-term fluctuations when compared to the prices fetched by manufactured goods produced in the developed countries. Secondly, that the operation of this marketing system results in the long run to the decline of primary commodity prices relative to the prices of manufactured goods.

---

4. See for example, Schachter, Sharing the world resources. Columbia University Press, New York, 1977, pp. 87-105; T.M.Frank.., "Standards of international commodity negotiations", (1978) 160 Academie de droit International Recueil Des Cours, II, 403; I.Brownlie, "Loaves and fishes: Access to natural resources and internationa law. An inaugural lecture delivered at London School of Economics, 1978.

This results in a circular deterioration in the terms of trade for primary commodity exporting developing countries when compared to exporters of manufactured goods in the industrialized countries.

The suggestion therefore, is that the operation of commodity pricing norms and institutions based on old notions of sovereign equality have not shown signs of benefiting countries dependent on the export of primary commodities. In fact these norms and institutions have tended to promote the unequal distribution of the benefits accruing from international economic relations.

It is for this reason that developing countries have in the past decade advocated of the revision of all those norms and institutions used in the marketing of primary commodities which are founded on outdated notions of sovereign equality of states. Such norms and institutions, it is argued, should not be applied to all transactions between countries without paying due regard to the evident inequalities existing between for example, the developing countries and the developed countries.

Developed countries however, have generally defended the status quo mainly in an attempt to safeguard their own interest, that is, to maintain their sources of supply of primary commodities and to obtain them at the lowest possible cost.[5]

---

5. For a fuller discussion of the commodity problem, see Stuart Harris, "The commodities problem and the international economic order: what rules of what game?" In P. Oppenheimer (ed.), Issues in international economics, (1980), London, Oriel, p.199.

This conflict of interest between the developed and the developing countries has been the core of the commodity marketing and pricing problems. Attempts at resolving this conflict in the past few decades have resulted in the conclusion of a number of international agreements seeking either to minimize commodity price fluctuations or minimize the effect of such fluctuations on those countries that depend on the export of such commodities.

The types of agreements that have emerged include international commodity agreements concluded between consumer countries and exporting countries of individual commodities such as is the case with the International Coffee Agreement; agreements creating organizations for exporting countries such as is the case with the Organization of Petroleum Exporting Countries (OPEC) and the Intergovernmental Council of Copper Exporting Countries (CIPEC); agreements concluded between a group of exporting countries on the one hand and a group of consuming nations on the other as is the case with the Lomé Conventions between the EEC and ACP countries. More recently a new type of agreement in the form of the Common Fund which seeks to tackle the problem from a global perspective has come into being.

The need for the conclusion of these various types of agreements has arisen as a result of the recognition of the fact that the conflict between producers and exporters of primary commodities cannot be resolved at the national level but needs some form of joint international measures.

It should be noted here that in the past few decades many of the developing countries exporters of primary commodities have at the national level taken measures aimed at reversing the effect of the existing norms and pricing institutions on the prices and income they receive from their exports.

III. National measures in copper exporting developing countries

A number of developing countries, exporters of primary commodities, have sought in the past two decades to tackle the problems arising within their economies as a result of fluctuations in the prices of copper by instituting various national measures. The most popular measure has been the introduction of legislation or policy aimed at regaining ownership and control of their respective mining industries. In 1970 for example, the government of Peru proclaimed the basic mining law for the country, namely Normative Decree Law number 18225 which enabled the Peruvian state to assume responsibility for the marketing of all mineral products. By the terms of that law, the state was to take over the responsibility for the marketing of copper within 18 months with the deadline being 14th October 1971. In this respect, the state was to outline all areas in which sales of minerals and mineral products were to take place and to set up all circumstances in which the state would approve sales contracts or take them over when national interest dictated so. This direct participation of the state in the marketing of copper and other minerals was to be effected through the Peruvian Mining Enterprise, Minero-Peru.

In Zambia, President Kaunda announced measures affecting the mining industry on 11th August 1969 which included the acquisition by the government of 51% shares in the mining companies. The year 1970 therefore, was devoted to the reorganization of the entire mining industry. This reorganization resulted in the creation of two wholly state owned companies, the Zambia Industrial and Mining Corporation (ZIMCO), and the Mining Development Corporation Ltd. (MINDECO) which was to hold the 51% shares in the mining companies on behalf of the government. In addition, all the mining companies formerly belonging to Anglo-American corporation were grouped into a new company namely Nchanga Consolidated Copper Mines (NCCM) and those formerly belonging to the Roan Selection Trust Ltd (RST), were amalgamated into a single company, namely Roan Consolidated Mines (RCM). Management contracts were then signed with both Anglo-American corporation and Roan Selection Trust to provide managerial, technical, and marketing services. For these services, RST and AAC were to receive 1½% of gross turnover and 2% of profits before income tax. The cost for Zambia as a result of these management contracts proved enormous. It is for example estimated that Anglo-American Corporation alone was paid about 3.3 million Kwacha in 1972 for marketing fees alone.[6] Bearing this cost in mind, the Zambian government announced through its then Minister of Finance, Mr. John Mwanakatwe, that a new marketing company was to be established.

6. Africa research bulletin, 1973, at page 2883.

Ten days later, on 24th September 1973 a company called Metal Marketing Corporation (Zambia) Ltd. was registered with an authorized capital of K500,000 and with provision for 10 directors. The responsibility of the company was to conduct the marketing of all minerals and mineral products produced in Zambia.

In another major copper exporting country, Chile, the government policy in 1970 was to reclassify the economy into private and public ownership with the latter absorbing all those industries and services considered vital to the economy of that country. Following this policy, all copper mines were to be nationalized and all marketing aspects of minerals were to be controlled by a state authority.

All the national measures undertaken by copper exporting developing countries have addressed themselves to issues of ownership, control of the production process and to some extent marketing. Focusing our attention on measures relating to marketing it is clear that what has been attempted is the creation of national marketing institutions to undertake individually the task of disposing of the minerals produced in their respective countries.

It is however, common knowledge that many of the multinational corporations that had been involved in the mining industries of these countries, did not only exert a firm grip on the ownership, production and disposal of the minerals, but did also control through a complicated network, the price setting institutions such as the London Metal Exchange. Although therefore, the power of these foreign investors has been curtailed through the various national measures discussed above, they still wield enough influence and power on international commodity price setting institutions to be able to manipulate the prices these countries may expect from their mineral products. Increasing the power of producer developing countries on these institutions would seem to be one of the main issues that may help copper producer countries like Zambia tackle effectively the harmful effects of price instability on the world copper markets. It is now commonly agreed by the UN that increasing the bargaining leverage of producer developing countries as far as commodity prices are concerned can take place only through concerted international measures aimed at generally restructuring the pattern of international trade relations between the developing countries on the one hand and the developed countries on the other.

IV. The United Nations and the restructuring of international relations

The need for the restructuring of legal norms and institutions governing the marketing of commodities has long been recognized by the United Nations. The General Assembly of the United Nations passed a resolution way back in 1974 calling for the adoption of a new international economic order.[7] In this resolution, the General Assembly observed that:

---

7. See UN General Assembly resolution 3201(S-VI). Reproduced in Djonovich, United Nations resolutions, Series 1, G.A., volume XIV, 1972-1979, page 527.

> "The developing countries, which constitute seventy percent of the world's population account for only thirty percent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent states and perpetuates inequality."

The new international economic order called for by the General Assembly was not only to be based on the principle of sovereign equality but on the full and effective participation of all countries bearing in mind the interests of the developing countries particularly the least developed, land-locked, island developing countries, and those developing countries most seriously affected by economic crises and natural calamities.

In an attempt to implement these declarations of principle, the General Assembly adopted the programme of action on the establishment of a new international economic order.[8] As far as it relates to the problem facing commodities exported by developing countries, the programme of action called on members of the United Nations,

> "to take measures to reverse the continued trend of stagnation or decline in the real price of several commodities exported by developing countries, despite a general rise in commodity prices, resulting in a decline in the export earnings of these developing countries."

This was followed by a more comprehensive pronouncement in the charter of economic rights and duties of states adopted

---

8. Resolution 3202 (S-VI), May 1974.

by the General Assembly in December 1974. The charter intended to deal summarily with a great number of problems in international economic relations. The problems dealt in the charter included activities of transnational corporations, organizations of primary commodity producers, restrictive business practices, transfer of technology, and preferential treatment of exports of developing countries.[9] In spelling out guidelines in these problem areas, it was hoped that a more detailed codification would follow. Efforts towards such a detailed codification of some of these topics have already yielded results. For example, a code of conduct for liner conferences was agreed as early as 1974, while work on a code of conduct for transnational corporations and a code on transfer of technology has recently been concluded.

While work towards the conclusion of codes of conduct in various spheres of international economic relations have been concluded or are in an advanced stage, the work of UNCTAD concerning general rules regarding trade in commodities appears to be in stagnation particularly after the not so successful UNCTAD VI which took place in Belgrade in June 1983.

Despite slow progress in formulating a comprehensive approach to the commodity problem similar to say the code of conduct for transnational, it remains clear that what the United Nations has called for in its resolutions on the

9. Charter of Economic Rights and Duties of States, Article 2 paras. 2, 5, 7, 13, 14, 18, 19, and 28.

new international economic order, has been the reordering of international rules governing commodity trade and the restructuring of institutions dealing with commodities.[10] Such a restructuring of the legal norms and institutions is rquired to be based on two objectives. First, it should aim at the stabilization of prices for primary commodities, and secondly, the stabilization of the export earnings of the countries dependent on the export of such commodities.[11]

This thesis is a study of the legal norms and institutions governing the marketing of copper. The effect these norms and institutions have on developing countries who export copper are not unique because exporters of other primary commodities in developing countries experience similar problems. It would however, have been unrealistic to discuss these norms and institutions in relation to all commodities exported by developing countries in one thesis.

Copper is exported by a number of developing countries but it would be impossible to deal satisfactorily with the effect such legal norms and institutions may have on all such producers. It is for this reason that in the thesis, particular emphasis is placed on one exporting country - Zambia.

---

10. A. Y. Abdulqawi, Differential treatment as a dimension of the right to development. (1979) Academie de droit international, 233.

11. See for example, the Manila declaration and programme of action - position paper of the group of 77, third ministerial meeting of group of 77, 26th January - 2nd February 1976. Document 77/mm(III)/49, 7th February 1976; REsolution 3202 (S-VI) of the UN General Assembly, programme of action on the establishment of a new international economic order, part I, para 3(a)(iii).

V. Copper in the Zambian economy

Zambia lies on the great inland plateau of Central Africa, a plateau that is rich in minerals. Geological surveys indicate that the country has vast deposits of copper, cobalt, manganese, silver, iron ore, and coal. But by far the largest deposits are those of copper.

Copper was first seriously exploited in the 1930s and has since continued to be a dominant factor in the economy of that country. Commercial exploitation of copper was up until 1969 in the hands of two groups of companies namely, the Rhodesia Selection Trust (RST) which was largely American financed, and Anglo-American Corporation with British and South African financial backing.

Since the 1930s, the Zambian economy has been dependent on copper for its very survival and today it represents over 90% of that country's total exports. In this respect Zambia represents an extreme example of a one sided economy with a rich import-export oriented mining sector and a poor and mainly subsistence agricultural sector.[12] The importance of copper to the Zambian economy is made glaringly obvious by the following tables:

TABLE I - Value of Zambia's copper exports and its percentage contribution to the gross domestic exports in selected years up to 1980.

Year	Export Value (K'million)	% of gross domestic exports
1965	343.2	93%
1974	877	94%
1980	900	94%

Source of figures, Republic of Zambia, monthly digest of statistics, various years.

12. C. S. Lombard and A. Tweedie, Agriculture in Zambia since independence. (1974) The National Education Company of Zambia, p.2.

TABLE 2 - Contribution of copper to government revenue between 1964 and 1980

Year	Total Govt. Revenue (K'mill.)approx	Copper's contribution to govt. revenue (K'mill.) approx.	% of contribution
1964	108	57	53
1970	432	218	52
1975	448	59	13
1976	443	? 12	? 3
1977	522	-1.1	
1978	560	-	-
1980	758	41	

Source: Estimates of revenue and expenditure for 1978-1980 and monthly statistics of earlier years.

VI. Copper and Zambia's export earnings

Table 1 above indicates that Zambia depends almost entirely on copper for its export earnings. This dependence on the export of one commodity, renders the country vulnerable to any slight fluctuations in the prices of the commodity on world markets. This vulnerability has become apparent in recent years due to the unpredictable nature of copper prices on the world markets. The unpredictable prices have resulted in three major problems for the country.

(a) Unpredictable revenue for the government

Since 1970, the Zambian government's share of the export earnings from copper has been constituted by the tax it levies on the profits accruing to the mining companies and dividends accruing to it by virtue of being a majority shareholder in the Zambia Consolidated Copper Mines (ZCCM).

Under the 1970 Mineral Tax Act (Act number 27), the rate of taxation for copper is 51% of the profits accruing to the mining company. In addition the government receives its share of the declared dividends in relation to its shares in the mining company. Unpredictable world copper prices therefore, make it difficult for the Zambian government to estimate its revenue from the exports of copper. Should the prices of copper fall below the estimated levels, it would mean less taxable profits for the mines and therefore less income for the government. Similarly a sudden drastic fall in the prices of copper would mean no profits for the mines and therefore no declared dividends. In fact between 1974 and 1980 this happened to be the position and therefore no dividends were paid resulting in the government's take diminishing drastically from K341 million in 1974 to nil in 1980.

(b) Increase in foreign debt

Unpredictable prices of copper have led to a situation in which the country has found itself borrowing increasingly to cover shortfalls in government revenue. Since 1969, copper prices have shown a fluctuating tendency and this has been reflected in the pattern of government debt as the table below indicates.

TABLE 3.

	Debt outstanding at end of year ($ million)	Service payments ($ million)	Service payments at % of exports	Service payments as % of govt. revenue
1969	246.6	29.9	2.2	4.8
1974	762.2	105.6	7.3	10.5
1975	1098.8	88.5	10.2	12.7
1976	1251.5	112.7	10.2	20.2
1977	1391.7	181.0	18.7	27.5
1978	1396.3	191.4	20.8	27.4
1979	1558.6	300.6	Not available	34.2

Source: IBRD, World Debt Tables, External Public Debt of Developing Countries.

(c) Government participation in new mining ventures

A further problem resulting from unpredictable copper prices for the Zambian government is likely to be one affecting the domestic particpation in new mining ventures.

Section 20 of the Mines and Minerals Act of 1976 makes domestic participation a pre-condition for the establishment of any new mining enterprises by a foreign investor in Zambia. The Act gives the government the option to participate up to the extent of 51% of the equity.

In view of the government's diminished revenue, it would seem unlikely that the government would opt for a 51% participation in any new ventures.

Indeed in 1980 the Zambian government encountered difficulties in finding the finance to develop the Mokambo deposits in conjunction with Romania.[13] The best it can do perhaps is to participate to the tune of less than 51% raising questions of control of such ventures. Minority control of such ventures would surely raise doubts about its programme of economic independence.

VII. The Role of the Mining Sector in the development process of Zambia

The role of the mining sector in the development process in Zambia is best understood in terms of price stabilization. Any contribution by this sector to the

---

13. See Mining Magazine, February 1980, p.169.

development of the country is therefore not only determined by its ownership, but also on how far Zambia is able to control the markets for the minerals it produces. Thus although Zambia has in recent years, introduced measures that have increased the direct role played by the state in mineral production, the salience of the global marketing and distribution systems through which Zambia must dispose of its minerals still remain very much as they were before it sought to gain control of the production process.

State intervention in the mining sector of Zambia is not an entirely new phenomenon; only its form and extent has changed radically in the last fifteen years. During the colonial era, state intervention was mainly limited to the determination of the conditions in which foreign investors would be allowed to undertake mining activities. It was assumed then that the operations of the foreign investor would stimulate development of the mining sector and the economy generally. The colonial government's power was therefore devoted merely to the securing of greater financial returns for the government through the taxation of the mining companies and through the exchange control regulations.

After Zambia gained independence in 1964, the new independent government, devoted much of its efforts to securing more financial returns from the mining sector. This was done through the renegotiations of the concessions agreements with a view to enabling the government to levy royalties and other taxes.

Since 1969 state intervention in the Zambian mining industry has assumed an even more direct form. The government set up a state mining and industrial corporation, namely ZIMCO, to take over the existing mining companies. The most important issue behind this change was the changing perception the government leaders now held regarding the appropriate role the mining industry should play in the development process.

Despite the increased role the Zambian government has now assumed in the mining industry, the problems of the linkages of the Zambian mining sector with economic forces beyond its borders still remain. As mentioned earlier on, the mining industry in Zambia remains highly dependent on the operation of international norms and marketing institutions to which Zambia as a country has little or no control.

VIII. The policy of the Zambian government regarding the mining industry

Since independence, one factor has helped to shape the policy of the government regarding the mining industry. This factor has been the need to utilize the mineral resources in the country to stimulate the development of the country. It is this factor which has dictated the various government policy changes that have taken place over the years regarding mineral ownership, control of the industry, taxation, investment, and the disposal of the mineral products.

As far as ownership is concerned, since 1970, the government owns the majority shares in all mining ventures. The majority ownership in mining ventures has helped provide an important linkage between the mining industry and the overall welfare of the country.

Taxation policies of the government have reflected the desire of the government to maximize government revenue from mining and thereby channeling the proceeds from that industry into the country's development efforts.

Before 1969 when the government announced the acquisition of majority shares in all mining companies, the government could only influence investment by legislation providing incentives to foreign investors. Since then however, the government participates more directly in all investment decisions in the mining industry. These decisions are now very much connected to the levels of copper prices and thereby government income.

Although the Zambian government's policies regarding the mining industry may be said to have provided a means through which the mining industry can shape the pattern of the country's economic development, one problem still remains. This problem is one of instability of the international copper markets. Instability in copper markets has tended to undermine this linkage between the mining industry and development. How this linkage is undermined has already been discussed above. Since the instability in the copper markets result mainly from forces external to Zambia, this is one area where Zambia is unlikely to succeed by employing domestic measures. It is due to the global nature of this problem that any efforts aimed at stabilizing the prices of copper must assume an international dimension.

IX. International co-operation in the stabilization of copper prices

Suggesting international co-operation in stabilizing of copper prices does reflect and support a doctrinal view that states are no longer totally effective individually as units of economic organization and economic policy making. The realities of present day international trade relations dictate that there ought to be some measure of international co-operation in tackling problems that transcend national boundaries. There are at least two views regarding the nature of such international co-operation which differ in their respective conception of sovereignty.

The first view regards sovereignty as the power to create laws that govern the behaviour of individuals in a given society. Those who hold this view, believe that any international co-operation in stabilization of commodity trade which results in rules to be observed by the co-operating state must of necessity derive from a higher authority similar to the sovereign in a nation state. This would entail the creation of a higher rule-making authority which would be responsible for the governing of the conduct of the co-operating states. A good example of where this approch is employed is the EEC. The treaty of Rome creating the EEC has been made part of the municipal laws of the member countries providing not only rights and obligations for governments but also for private individuals in the community. New laws having similar effect are continuously being created by the organs of the Community such as the Commission, the Council and the European court.

What this kind of international co-operation brings to the fore is that sovereign states must be willing to forego part of their sovereignty and subject their societies to laws, the creation and interpretation of which they do not fully control. This approach to international co-operation however does not seem to hold a lot of promise regarding global problems such as commodity price fluctuations.

The alternative approach which seems more acceptable and which has over the years been employed in tackling various problems transcending national boundaries is one that seeks to bring together a number of states with a view for them to jointly control those areas of economic life which none could control individually. The concept of sovereignty envisaged in this view is the vesting of the power to shape and control the desired economic goals in a jointly created and run international regulatory agency.

This latter approach has been behind all measures that have been suggested by various scholars for the stabilization of copper prices. The important measures that have been suggested as the basis of economic co-operation in the stabilization of copper prices include international commodity agreements embodying both producers and exporters, producers' associations, compensatory financing schemes, reform of international marketing arrangements, and long term guaranteed price agreements.

CHAPTER TWO

BACKGROUND AND DEVELOPMENT OF THE COPPER MARKETING SYSTEM FOR ZAMBIA

This chapter examines the background and the historical development of the various aspects of the Zambian mining industry. Such a background is necessary in order to grasp the problems Zambia faces in the marketing of its copper today. Issues that will be discussed here are the development of mineral ownership, control of production, the structure of taxation of the mining companies, legislation aimed at the regaining of the production stage by the state, legislation aimed at the reassertion of the right to ownership of minerals by the state, and legislation aimed at the restructuring of the copper marketing arrangements.

I(i) Mineral ownership

Under the English common law, the position has always been that individuals and companies can acquire mineral rights. This position is a result of a long standing principle of English common law that recognizes the right of a land owner over everything above, upon and below the surface of his land.[1]

In Zambia, prior to the start of colonial rule, land and everything above and under it was owned by the tribal groups who occupied it. This joint ownership was only

1. H. Williams, The Mining Law of Northern Rhodesia, (1963) London, p.29.

subject to the authority of the tribal kings and chiefs who were responsible for seeing that law and custom were observed in its use.[2] Under the authority of these rulers, one could work the land for agriculture or mining in accordance with the prevailing laws and customs.

The dawn of colonialism in Zambia, heralded a new era in as far as ownership of minerals was concerned. European settlers and companies embarked on a search for mineral concessions from the various tribal authorities. The process of hunting for minerals in that part of Africa had like in many other parts, been triggered by the process of industrialization in Europe. The industrialization process in Europe had resulted into an increased demand for raw materials to feed the increasing number of industries. For individual European countries this meant a search for raw materials by way of carving spheres of influence that would exclude others. In these spheres of influence, a vigorous search for raw material was embarked on, and in the case of minerals this was the genesis of concession hunters.

In the area covering the present day Zambia the first step was for the concession hunters, both companies and individuals, to negotiate with the tribal rulers concession agreements. Many of the resulting concession agreements had generally the same effect - to transfer mineral ownership from the tribal group to the companies or individual settlers. The most important concession granted was that granted by

---

2. A. Roberts, ., A history of Zambia, (1976) Heinemann, p.144-145.

Lewanika, the King of the Lozi. Under this concession, the British South African company obtained the ownership of mineral rights to an area that covered virtually the entire western portion of Zambia. In return for these rights, the company simply made a pledge to protect the King and his subjects against external aggression and an annual subsidy of £850 to the King.[3] This pattern of acquiring mineral rights was not unique to the situation in the territory that now constitutes Zambia. This pattern had been followed elsewhere. For example, in Zimbabwe it was the Rudd concession granted by Chief Lobengula in 1890 and later passed to the British South African company which transferred the mineral ownership to that company. Under the terms of that concession, Lobengula signed away the rights of the Matabele people to minerals in their land in return for a consignment of guns from the company. A similar approach was followed by the East India company in India, in some parts of East Africa and West Africa.[4]

In the case of Zambia, the British South African company (BSA) which was a chartered company whose charter had the effect of authorising it to bring the concession areas under British influence and to proceed to administer them on behalf of the British crown proceeded to establish an administrative machinery for the territory.[5]

---

3. The Lewanika concessions of 17th October 1900 and 11th August 1909, Reproduced in H. Williams The Mining Laws of Northern Rhodesia, (1963) London, Appendix.
4. F. M. Bourret, Gold Coast, (1952) Oxford Press, London
5. A. Roberts, A History of Zambia, p.157.

The concession agreements that transferred mineral rights to the BSA company have been challenged for at least three reasons. First, that concessions sometimes covered areas to which the issuing tribal ruler had no authority. This certainly appears to be the case with the two Lewanika concessions mentioned above. Secondly, doubts have been expressed as to whether tribal rulers such as Lewanika knew what they were signing let alone whether they knew that they were parting with mineral ownership. Thirdly, doubts have been expressed as to whether Lewanika for example, had the mandate of his subjects to dispose of mineral rights in the way he did.[6]

These three views bear a lot of relevance to the attitude of the post independent Zambian government towards mining companies which it considered to have exploited the colonial situation to obtain mining rights.

(ii) British Colonial Administration and mineral rights in territories

The beginning of the 1900s was characterised by an increased interest by the British government in administering directly the various territories that had been brought under their sphere of influence by concession companies. In Ghana for example, the British government dissatisfied with the policy of the African company brought the territory under direct British rule in 1874.[7] In Zambia, for basically similar reasons as in Ghana, the British government assumed direct administration of the territory in 1924.[8]

6. Northern Rhodesia Hansard, Number 60, p.336.
7. British and Foreign papers, 1894, volume LXVI, p.957.
8. A. Roberts, A History of Zambia, (1976) p.182.

The manner in which territories were brought into direct British administration played a decisive role in the nature of the mining laws regarding mineral rights. In the case of those territories designated as colonies, mineral rights were usually vested directly in the British crown. In this case any grants of land to colonial settlers and companies reserved all mineral rights in the crown. Generally speaking, therefore, ownership of land in such territories did not entail ownership of minerals. This fact was reflected in a number of early mining laws in a number of British territories. In Ghana for example, the Mineral Ordinance of 1936 vested all the property in and control of all minerals in the British crown.[9]

The second category of former British territories are those that fell under British administration through the League of Nations mandate system. Under this system, territories that had been administered by Germany, were entrusted to certain governments of the victorious allies to administer with a pledge to advance the territories to eventual self rule. In the British mandates, the early mining laws vested all mineral rights in the governors of the territories to be held in trust for the inhabitants of the territories. An example of aterritory that had been administered in this way was Tanganyika, now Tanzania. The first mining ordinance in that territory vested all mineral rights in the governor.[10]

In the two categories of territories above, that is the colonies and mandates, there was no question of an

9. Mineral Ordinance of the Gold Coast, 1936, section 13.
10. Mineral Ordinance of Tanganyika, 1920, section 22.

individual or company acquiring mineral rights. All that could be acquired were mining rights in the form of a lease which was acquired under the terms of the laws existing at the time, and for a duration specified in the lease. In Tanzania, for example, one could acquire a mining lease that did not exceed twenty years in duration.[11] In Kenya, the leases were to run for a period of between five and twenty-one years, while in Ghana the leases could cover any period between one and 99 years.[12] This position in the two categories of territories continued unchanged until the time of independence when the new independent constitutions transferred the mineral rights to the newly created states.

II. The Development of Mineral Rights Legislation

The development of mineral rights laws in Zambia took a slightly different pattern from those discussed above. Until 1912 when the very first mining legislation was promulgated in the form of proclamation number five of 1912, the position was that all mineral rights to a vast portion of the territory vested in the British South Africa company (BSA). The 1912 proclamation, essentially vested the right to search, mine, and dispose of all minerals and mineral oils in the BSA.[13] The same legislation gave the BSA the right as

11. Ibid., section 29.

12. Kenya Mining Ordinance of 1940 sections 39 and 43 and The Gold Coast Mineral Ordinance of 1936 section 37.

13. Preamble, The Northern Rhodesia Proclamation number 5 of 1912.

administrator of the territory, to grant prospecting and mineral rights to individuals and companies.

The agreement by which the administration of the territory was taken over by the British Colonial Office in 1924 strengthened the BSA company's legal position regarding mineral rights. In this agreement, the pattern followed in other British administered territories was not followed, and the company was allowed to retain its mineral rights. The transfer of the responsibility for the administration of Northern Rhodesia from the hands of the company into the hands of the British Colonial Office did not therefore cause any substantial change in the position of mineral rights in the territory.

The first change in the position of mineral rights in Zambia was made in 1958 when legislation was passed vesting ownership of minerals in the British crown, but subject to the rights of the BSA company.[14] As mentioned above, however, the company owned practically all mineral rights in the territory except perhaps to the extent it had disposed of such rights. This being the case, the 1958 Ordinance would seem to have vested only residual mineral rights to the crown. In other words the company still owned the important mineral rights and the crown was only vested with mineral rights in those areas where the company had not seen fit to stake a claim.

The most important mineral rights in Northern Rhodesia continued to vest in the BSA company until the country

14. Northern Rhodesia Mining (Amendment) Ordinance, 1958, section 6.

gained independence in 1964. At the time of independence, the new government acquired the company's mineral rights and a £4 million compensation was paid to the company by the Zambian and British governments jointly. It is only at this point, in fact, that the mineral rights became vested in the state. Legislation effecting this change was enacted in 1965.[15]

One of the important consequences of mineral rights being held by the BSA company and not the British crown as in other former British colonies, related to the grant of mining rights. All legislation enacted in Zambia during the colonial period dealt with the system of acquiring, holding, and termination of mining rights. Since the company owned mineral rights in virtually the whole territory, legislation passed during that time gave the right to grant prospecting and mining rights to the company. A mining right could therefore be acquired only by obtaining a prospecting right or special grant from the company.[16] The power of the company to issue mining rights was very important in that it allowed the company to control the production process and the pattern of investment in the mining industry in Zambia.

The ownership of minerals gave the company a further aspect of control over the mining industry in that country, that is, the power to collect a substantial portion of the revenue accruing from the mining activities in the form of royalties and other rents. The company's control of

---

15. Act No.5 of 1965.

16. The Northern Rhodesia Mining Proclamation of 1912, sections 6, 7, 9, 11, 13 and 14.

production and investment is discussed later on in the chapter under the heading, "control of production", and the issue of royalties is discussed immediately after this section under the heading of "mineral taxation in Zambia".

It will suffice here to mention that the pattern of mineral ownership that Zambia experienced during the colonial period had important consequences in relation to the control multinational corporations were in later years to exercise on the production process, investment pattern, and marketing arrangements in the mining industry. Indeed this dictated to a great extent the pattern of the legal measures the independent state took to regain control of the mining production, investment, taxation, and the marketing arrangements for its mining industry. These measures are discussed in detail in the following three sections.

III. The Development of Mineral Taxation Legislation

(i) Mineral Taxation in general

Revenue derived by a government from exploitation of mineral resources in any one country usually falls into one of the following classes: licence fees, rents, royalties, taxes, and export duties. The usual practice is that fees are charged for a service rendered or for an administrative action taken by the government. Royalties, on the other hand, are usually levied as a percentage of production while taxes are usually levied on the income that accrues to the mining enterprise as a result of the exploitation of the minerals. Export duties are really self explanatory and are levied on the minerals exported.[17]

In former British colonies, two patterns of mineral taxation were followed. The first pattern was followed in those colonies and territories where mineral rights were vested in the crown or in the colonial Governor on behalf of the people of the territory. The second pattern was followed by those territories where mineral rights were vested in concession companies as was the case in Northern Rhodesia, now Zambia. In both cases however, provisions governing the payment of rents, royalties and export duties, were usually embodied in laws specifically dealing with the exploitation of mineral resources while those dealing with taxes were embodied in the general laws on income tax.[18]

The nature of the mining taxation laws for any country are dictated by the socio-economic policies that the administration sets itself to achieve. Once the policies have been identified, the actual provisions of the laws dealing with the taxation of mineral resources demonstrates two important facets. First, they set out rules as to who must pay the tax, and secondly in what respect.

The manner in which the socio-economic policies dictate the pattern of mineral taxation laws can be exemplified by an examination of the mineral taxation laws of Zambia during the colonial days and after independence. This is important in the understanding of the taxation measures that have been taken by the Zambian government in an effort to obtain a

---

17. United Nations, Survey of Mining Legislation, (1959) Mineral Resources Development Series, Number 9, New York, UN Sales No. 1957.II.F.5.

18. See for example, sections 59 and 60 of the Northern Rhodesia Mining Proclamation of 1912.

greater portion of the profits that accrued to the mining companies and how it has gone about implementing them.

(ii) Mineral Taxation Legislation in Zambia prior to 1924

Up and until 1924, mineral rights in the area now known as Zambia were vested in the BSA company. These rights were recognized by the first mining legislation, that is the 1912 Mining Proclamation. Prior to this legislation, the company could grant prospecting licences and mining rights to individuals by means of an exchange of letters.[19] The terms and conditions of such grants included a number of aspects regulating the positions of the company vis-a-vis the prospector or miner. Some of the most important issues in these exchange of letters included the obligation of the grantee to pay royalties and certain fees to the company and an obligation on the grantee to offer the company 30 to 50 percent of the equity of any company established to work a discovery.[20]

Although the position in Zambia up to 1924 is said to have been based on the mining laws then in existence in Southern Rhodesia (now Zimbabwe), the issue of mineral taxation seems to have followed different patterns in the two territories. In Zambia the question of royalties was deliberately left to be determined as a matter of contract between company as grantor of mining rights and the

---

19. See for example, concession to F.R. Burnham etc., Geological Surveys Department, Lusaka.

20. Letter from the BSA company to Northern Rhodesia territories BSA Exploration Company Ltd. dated 17th April 1899. BSA Register of titles, Geological Survey Department, Lusaka.

grantee of such rights. This allowed the company to determine the rate of royalty and who should pay them. This greatly enhanced the power of the company in shaping the pattern of investment in that country's mining industry.

In Southern Rhodesia (now Zimbabwe), where the same company owned mineral rights up to 1933, mining legislation had been passed specifically dealing with the issue of mineral royalties and other fees.[21] The 1907 Mining Ordinance in that country, for example, made provision for the working of a block of claims for profit.[22] The claim holder who embarked on mining for profit was required to either pay royalties to the company, levied on a sliding scale varying from two and a half percent to 7½ per cent of the output, or offer the company a 30 per cent undivided interest in the claim in lieu of royalty payment.

The difference in approach in the two countries would seem to reflect the company's policies towards the two territories at the time. At the time, Northern Rhodesia had just been opened to prospectors and therefore only a few mines had actually been located. The company was eager to attract more prospectors by giving them incentives. One of these incentives came in the form of varying royalty payments. In Southern Rhodesia however, the mining industry had already made great strides and had shown steadier promise of success which the company was ready to exploit in the form

21. C. Stoneman, Zimbabwe's Heritage (1981) The McMillan Press Ltd., London, p. 174.

22. Southern Rhodesia Mining Ordinance, 1907, section 12.

of royalties.[23] The company primarily looked to the mineral wealth of this territory to give it adequate returns on its capital.[24] For this reason, it was necessary to have specific taxation formulae embodied in the mining legislation.

The basis of mineral taxation in Zambia up to 1924 was therefore, the royalty provisions embodied in the various prospecting grants and special mining grants made by the company. It is difficult to assess the extent of the revenue the BSA company received by way of royalties mainly because many prospecting grants were never properly kept by the company and have over the years vanished without trace. One thing that is clear however, is that whatever the company received through royalties must have been substantial although not many mines had reached production stage in the territory by 1924. Thus for example, the report of the 23rd ordinary general meeting of the company held on July 24, 1919 indicates that the company's income from royalties in Northern Rhodesia for that year amounted to £105,600.

(iii) Mineral Taxation Legislation between 1924 and 1964

The position regarding mineral royalties in Northern Rhodesia was not changed by the transfer of the administration of the territory from the company to the British Colonial Office in 1924. The Devonshire agreement that effected the transfer merely recognized the company's title to mineral

---

23. Report of the BSA company, 10th Ordinary General Meeting held on 22nd November 1905. BSA Reports of General Meetings, London, p.8.

24. *Ibid.*, at page 6.

rights in the territory and allowed the company to retain this right.[25] The company's retention of the mineral rights appears to have resulted from an earlier decision of the Privy Council regarding the ownership of land in Southern Rhodesia. In the Privy Council's decision, the Council was of the opinion that land in Southern Rhodesia was owned by the crown and the company had all along acted as an agent of the crown in the administration of that territory. For its reward in the work it had done in that territory, the company was to look to its acknowledged mineral rights. On the basis of this reasoning it would seem, the British government was willing to let the company retain its mineral rights in Northern Rhodesia after 1924.

The retention of mineral rights by the company and the assumption of administrative powers by the colonial office meant that there were now two important forces as far as mineral taxation was concerned. The holders of mineral rights, that is, the BSA company continued to levy royalties, while the local colonial administration levied other taxes which included ordinary income tax on the mining companies and tax on the royalties received by the BSA company. The legislation passed after 1924 therefore, concentrated on defining the nature or scope of income from mining that was to be subjected to tax and the rates of such taxation. This meant that there were two basis for the taxation in the mining industry in the territory. First, there was taxation based on production which was levied by the company in the form of royalties, and secondly, income

25. A. Roberts ., A History of Zambia, (1976) p.182 .

tax levied by the colonial government. Income taxation however, played only a minor role in the revenue of the colonial government before the Second World War. This factor might explain the lack of substantial and elaborate income tax legislation in the territory prior to 1945.

In other former British colonies, the position regarding mineral taxation was not as complicated as the case was in Northern Rhodesia. For example, in Southern Rhodesia, mineral rights had by 1933 passed to the local government. In these circumstances, the government of the territory collected both royalties and income tax.

The first income tax legislation in Northern Rhodesia that affected income from the mines was the Income Tax Ordinance of 1921.[26] This Ordinance governed all income taxation arrangement in the territory until 1926 when it was repealed by the Income Tax Ordinance number 18 of that year. The 1926 Ordinance provided the general structure for company and personal taxation in the territory until 1953 when new arrangements were made within the structure of the newly created Federation of Rhodesia and Nyasaland.[27]

A general survey of the 1921 Income Tax Ordinance and the 1926 Ordinance reveals one interesting point. First, these Ordinances, like those found in many other former British territories, did not provide any conceptual definition of income but merely enumerated the items which were

---

26. Northern Rhodesia Income Tax Ordinance. Ordinance No.13 of 1921.

27. Federation of Rhodesia and Nyasaland, Act No. 16 of 1953.

considered to be income. The reasons for this lack of a conceptual definition of income appear to have been historical. The two statutes were based on the United Kingdom income tax laws existing at the time. The United Kingdom statutes did not attempt to define income but were content with merely enumerating certain types of income. Since the legislative draftsmen for colonial legislation were based in the Colonial Office in London, this approach was easily imported into the colonies.

The two income tax ordinances in Northern Rhodesia defined income as including any gains, profits, dividends, interests, rent, royalties, and premiums. This definition of income enabled the colonial government in the territory, not only to tax the profits of the mining companies but also royalties accruing to the BSA company.

The rates of company taxation in most British administered territories were very low. For example, in Kenya and Uganda during the colonial era, the rate of income tax levied on the company profits was 27 per cent.[28] Similarly, in Northern Rhodesia the company tax rate was about 37 per cent by 1959. Thus although the colonial government had power to tax the income of mining companies, the low rate of taxation made it possible for the companies to continue retaining large portions of the profits. These profits did not benefit the territories concerned but the shareholders in the companies. The territorial government's failure to capture a substantial amount of the profits earned by the mining companies and

28. Organisation for European Economic Co-operation, Taxation Systems applicable to investments in the overseas countries associated with member countries of O.E.E.C., volume 1, Paris, (1960), p.93.

the royalties earned by the BSA company does explain the nature of the taxation changes introduced by the post-independence government. Before discussing the taxation system after independence, it would be worthwhile to discuss another important mineral taxation phase, which obtained during the life of the Federation of Rhodesia and Nyasaland to which Northern Rhodesia was a party.

IV. Mineral taxation arrangements in the Federation of Rhodesia and Nyasaland

The problem of mineral revenue taxation was made even more complicated by the creation of the Federation of Rhodesia and Nyasaland in 1953. The taxation arrangement in the Federation was such that all moneys arising from income tax and customs duties levied from 1954 were to be paid in a consolidated fund by all the three constituent territories, that is Northern Rhodesia, Southern Rhodesia and Nyasaland.[29] The moneys in the consolidated fund were then to be distributed amongst the three territories in the proportion of 17% to Northern Rhodesia, 13% to Southern Rhodesia and 6% to Nyasaland.

The inadequate Northern Rhodesia taxation rates on the income of the mining companies coupled with the Federal arrangements contributed to the drain of copper revenue from that territory which went to finance the other two constituent territories in the Federation, and to the shareholders in the two mining companies who were mainly British, American and South African. It was in an effort to check this drain that the

29. The Territorial Revenue (income tax and customs duties) Distribution Act, 1954, section 3(2).

Zambian government introduced new tax legislation after independence.

V.. Mineral Taxation legislation in post independence Zambia

(a) Royalties

The first major step taken by the post independence government was to effect a change in the royalty system affecting the mining industry. To achieve this the government had first of all to repossess mineral rights from the BSA company.[30] An Act of Parliament was passed repossessing mineral rights and vesting them in the President of the Republic. Although this Act vested mineral rights in the President on behalf of the state, large mining areas remained subject to mining rights which were held in perpetuity by various mining companies. The government could therefore not compulsorily acquire these areas without infringing the independence constitution which protected the rights of the companies.[31] It was of course within the powers of the government to amend the constitution except that the provision protecting the mining companies were entrenched and required a referendum before an amendment could be effected. Despite this handicap, the vesting of mineral rights in the state enabled the government to grant prospecting and mining rights on those areas that had not already been a subject of mining rights.

Another important aspect of this change was to enable the government to collect mineral royalties. Under section 3

---

30. Act number 5 of 1965.

31. Zambian independence constitution, section 18.

paragraph 4 of Act number 5 of 1965, all instruments requiring payment of rent, royalties and fees were to be regarded as having been concluded with the government and were therefore to be paid to the government. By the use of its legislative power the post independence government was able to check the drain of the income accruing from its single most important natural resource, minerals. In this way it became possible for the state to recoup a larger percentage of income from its mineral wealth.

The basis for calculating royalty payable to the government remained the same formula that had been used by the BSA company. According to the formula a 13½% levy was collected by the government on the price of copper less K16. The price for purposes of this formula was calculated on a monthly average of the eight sets of prices ruling on the London Metal Exchange. Since the price was calculated on a monthly average of the London Metal Exchange prices, the formula did not always reflect the actual price the mining companies received. By the use of this formula therefore, some of the income managed to escape being taxed. A formula based on a percentage of the sales would have enabled the government to obtain a greater and realistic share of the income accruing to the mining companies.

A formula based on sales was used in other countries such as Botswana which calculated its royalties at a percentage of excess of sales revenue over production. For example, by section 12 of the Bamangwato Concessions Ltd. Mining Lease Act of 1970, the company was required to pay royalties at the rate of 7.5% on excess of revenue over production.

Similarly, section 1 of the De Beers Botswana Mining Company Agreement Act of 1970, required De Beers to pay royalty at the rate of 5% on the gross proceeds of diamond sales.

It was perhaps due to the weakness of the formula used to calculate royalties in Zambia that the government was forced to take further measures to change the basis of mineral taxation.

(b) Mineral Export Tax

In 1966 the government imposed an export tax on copper which basically aimed at increasing the government's take from the mining industry. This type of tax had its own shortcomings in the sense that it was not possible to levy it immediately the exportation took place but had to wait until the mining companies' audited accounts were made available to the taxing authorities. This lapse in time was in fact an unannounced tax holiday for the companies.

It was partly due to this weakness that in 1969 a new mineral taxation policy was announced by President Kaunda. The new policy announcement called for a change on the basis of taxation from one based on royalty on production and export tax, to one which would be calculated on the basis of profits.[32]

To implement the 1969 policy decision regarding the basis of mineral taxation, a Mineral Tax Act was enacted. This Act required all mining companies to pay a tax at the rate of 51% on the profits accruing from the sale of copper. Other minerals were levied at different rates. For example,

32. "Towards Complete Independence", Address by President Kaunda to the UNIP National Council, 11th August 1969, Government Printers, Lusaka, 1969.

the rate for lead and zinc was 20% of the profits. In the case of copper, the 51% tax was to be levied in addition to the ordinary company tax resulting to the effective tax on the mining companies being about 70% of the profits.[33]

By the use of various domestic tax legislation, the Zambian government was able to change the inherited basis of taxation and enable itself to capture a greater share of the income deriving from mining. But even such tax legislation did not seem to guarantee national control of the mining industry if the production and the marketing aspects of the industry were not adequately restructured. The restructuring of the production process was tackled by the use of domestic legislation in the manner to be discussed below.

IV. Control of the production process in the copper mining industry

(i) Control of production in pre-independent Zambia

Until the time of independence, control of the production process in the Zambian mining industry was in the hands of two groups of transnational corporations, that is to say RST and Anglo-American corporation. The colonial administration, as already mentioned above, was content to use its legislative power to enhance its role of tax collector.

Control of production was in the main left in the hands of the transnationals. This control was exercised in accordance with a number of legislative provisions.

---

33. Act no. 27, of 1970.

One such legislative provision related to the power of granting prospecting and mining rights. As discussed earlier on, the BSA company owned mineral rights until the time of independence. Legislation passed during the colonial period did not affect this right but perhaps enhanced it by giving the company the prerogative of granting prospecting and mining rights on its own terms and without reference to any set rules regarding persons to be issued with such grants. The only limitation was the requirement that such prospecting and mining grants were to be registered.[34] The company was also by legislation empowered to make other grants notwithstanding that they were inconsistent with other provisions of the Mining and Mineral legislation. Such grants were known as special grants.[35] The natural result of these legislative provisions was to allow the BSA company an independent hand in the determination of the persons and companies that would be engaged in mineral production. In this way the company did not only control the nature and pattern of investment in the country's copper industry, but actually demanded participation in all subsequent mining ventures. Every registered mining location was required to be held on joint account with the company, in the proportion of $\frac{1}{3}$ to the company and $\frac{2}{3}$ to the registered holder. In later years this could be substituted for royalty payments.[36]

---

34. Northern Rhodesia Mining Proclamation, 1912, section 6.

35. Ibid., section 27.

36. Muna Ndulo, Requirement of Domestic Participation in New Mining Ventures in Zambia,(1977)10 Comparative and International Law Journal of South Africa, 257.

Further control on the production process in the Zambian mining industry was exerted by the provisions that required that mining locations or special grant areas be worked for profit only with the prior sanction of the BSA company.[37]

A similar firm hold on the production process of minerals was exhibited in a number of other African countries. The first mining legislation in Zimbabwe, for example, required that every claim be held on equal joint account with the BSA company.[38] The proportion of the joint account was later reduced to 30% by the Southern Rhodesia Mines and Minerals Ordinance of 1903. Further changes were made in 1907 giving the claim holder the option of either paying a royalty on a sliding scale varying from $2\frac{1}{2}$% to $7\frac{1}{2}$% of the output, or offering the company an undivided 30% interest in the claim.[39]

The power to issue prospecting licences and special grants, coupled with the desire to enter into joint mining activities with companies that had adequate capital to embark on mining, meant the attraction of large mining companies into Zambia. It is no secret that the exploitation of the mineral resources in the territory required capital far beyond what could have been locally available. It is partly for this reason that the BSA company used its statutory power to issue prospecting and special mining grants, over large areas of land to powerful companies that

---

37. Northern Rhodesia Mining Proclamation, 1912, section 58.
38. Southern Rhodesia Mines and Minerals Ordinance.
39. Southern Rhodesia Ordinance No.10 of 1907.

had international financial backing. The first to benefit from the BSA company's statutory power was the Rhodesia Congo Concession Ltd. which later became part of Rhokana corporation. The second company to benefit from this arrangement was the Selection Trust which had been formed with substantial American capital. By various and intricate financial arrangements two powerful combines came to control the production of minerals in Zambia. These were the Rhodesia Selection Trust (RST), and the Anglo-American corporation (AAC).[40] With the attractive labour and taxation laws, these conglomerates, expanded their scope and range of activities, ending up ultimately, not only dominating and controlling production of minerals in Zambia, but in conjunction with other transnational corporations, the major marketing institutions by which minerals are sold.

The control of the production process by these transnational corporations had important consequences for the Zambian mining industry at the time of independence. These corporations had by the time of independence acquired large portions of land for purposes of prospecting and mining, which they held in perpetuity. This meant that the government had no legal power to determine the volume of production, rate of investment, dividends distributed, or the rate of reinvestment. Equally important, the government did not have any equity shares in the corporations and could therefore not legally influence management decisions and policies

40. L.H. Gann, The Northern Rhodesia Copper Industry and the World Copper: 1923-1952.(1955) 18 Rhodes-Livingstone Journal, 5.

regarding the pattern of reinvestment and production. Thus whereas the state had the power to tax the mining companies, as has been explained above, it did not have the ability to shape the pattern of development of the mining industry. This resulted into a situation in which the power of taxation which the government wielded, was inadequate to increase the state's share of the income accruing from the mining industry because the mining corporations were at liberty to manipulate the production capacity and by that fact, the taxable income.

There are two ways a state could follow in rectifying a situation of this nature and regain control of production. First, the state can effect an outright nationalization of the mining industry. Since almost all countries recognize and safeguard property rights of foreigners, any nationalization involves payment of compensation. Although there are no clear rules regarding the amount of compensation, international law traditionally requires such compensation to be prompt, effective and adequate.[41]

In the case of Zambia, the 1964 constitution protected the property rights of foreigners and any nationalization of their property could only be undertaken if prompt, adequate, and effective compensation was paid. Outright nationalization of the mines therefore, required the government to have enough resources to meet its obligations to the foreign investor in terms of compensation. This must have been beyond the means of the government at the time of

---

41. Chorzow Factory Case, [1926-29] P.C.I.J., Series A Nos. 7, 9, 17, 19.

independence. But perhaps even more important is the fact that nationalization has always been looked at as a factor that scares away foreign investors. Zambia could not at the time afford to antagonize the foreign investor when it needed foreign investments in various other aspects of its economy. Finally, an outright nationalization usually means the loss of the expatriate technicians and management which can have disastrous effect on the country that did not have adequate trained manpower to takeover the running of the industry concerned.

Zambia had at the time of independence very few qualified personnel to keep the wheels of the mining industry running in the event of a sudden exodus of the expatriate personnel. It was for these and other reasons that Zambia opted for another approach to regaining its control of the production process in the mining industry.

The second approach that has been used in some countries to gain control of the production process in the mining industry has been that of equity participation by the state in existing and new mining ventures. For example, in Zimbabwe, the state opted in 1982 for equity participation in a number of existing mines including the important Wankie coal mines. Zambia has also sought to regain control of the production process of copper and other minerals by a calculated state participation process.

(ii) <u>State participation in the Zambian Mining Industry</u>

The concept of state participation became strongly favoured by the developing countries in the 1960s when it became generally accepted that the role of the state had changed from one of a passive observer in the economic activities to one that accepted first responsibility for its economic development.[42]

The term, "state participation", does not seem to have any specialized meaning other than a mere functional description of the purpose of the arrangement. There are two main forms of state participation; the equity joint venture alias the joint stock venture, and the contractual joint venture.[43] Of the two, the equity joint venture has tended to be dominant in the participation of third world states in their mining industries.

The legal structure and form of any participation agreement depends on the nature of the project, the choice of the parties, and their respective bargaining power. In Zambia, for example, to implement the desired policy of equity participation, the state negotiated for a 51% equity shareholding in existing mining companies.

The creation of an equity participation arrangement entails the conclusion of contractual agreements between the parties, setting out their participation relationship, management structure, control and management of production and investment.[44] In the case of Zambia, state equity

---

42. S. Sideri and S. Johns (ed.), Mining for development in the third world: multinational corporations, state enterprises and the international economy.(1980) Pergamon, N.York.

43. W.H.E. Jaeger, "Joint ventures: origin, nature and development", (1978) American University Law Review, p.1.

44. See for example, the case of state participation in India, K.K. Sharma, "IBM prepares to close down in India", Financial Times 11th November 1977. See also K.K. Sharma, "Sovereignty and multinationals", Financial Times, London, 11th November 1977.

participation involved the conclusion of a number of agreements between the state and the two mining companies. In addition to the master agreement setting out the terms of participation, management and marketing contracts were concluded.

The acquisition of the 51% equity shares in the two mining companies reflected a desire on the part of the state to control mineral exploration and production in the country.[45]

The usefulness of the concept of equity participation in the control of the production process, seems to have its basis in the general principles of corporate law. One of the basic rules in corporate law is that a holder of majority shares in a company exercises control over the affairs of the company by virtue of having the majority directors in the board and control of the general meeting.

In Zambia, it was thought that by acquiring at least 51% shares in the two mining companies, the state would be able to control the production stage of the mining industry by infiltrating the Boards of Directors and the General Meetings of the two companies. What was not realized, at least initially, was that it was possible for the mining companies to frustrate the efforts of the state in gaining control of the production process through a carefully planned manipulation of the very corporate principles. Thus the efforts of the Zambian government were thwarted by the

---

45. "Towards Complete Independence", Address by President Kaunda to the United National Independence Party National Council, 11th August 1969, Government Printer, Lusaka, 1969.

inclusion of a provision in the articles of association of the two companies, that is RCM and NCCM, which had been drafted as part of the agreement aimed at facilitating state participation. This provision required certain important decisions of the Boards of Directors to be passed by an affirmative vote of the "A" directors (appointed by the State), and "B" directors (appointed by the two companies).[46] This requirement made it possible for the minority shareholders to veto the decisions of the majority shareholders thereby defeating the whole idea of state participation. Although all the articles of association of the two companies formed part of the master agreement, it is difficult to believe that the government agreed to the provision knowing that it would have these consequences. The more likely explanation appears to be that the inclusion of the provision was a carefully calculated move by the two companies to maintain for themselves a measure of control regarding issues such as production and investment - a move that may have escaped the attention of the government negotiators.[47]

The concept of equity participation also opens the possibility of the State gaining control of production through the power to appoint top management. This is so because usually the majority shareholder has the power to appoint the top management such as Managing Directors and General

---

46. See for example Article 101 of Nchanga Consolidated Copper Mines articles of association.

47. For a critical analysis of this kind of provision, see M.L.O. Faber and J.G. Potter, Towards Economic Independence: Papers on the nationalization of the copper industry in Zambia,(1971) Cambridge University Press, p.114.

Managers. But even in this case, the expectation of controlling the management decisions through the power of appointing top management seems to be far fetched in many developing countries because the exercise of management powers is usually delegated to management companies affiliated to the foreign companies in the joint venture. The delegation of management affairs in this way is a reflection of the strong bargaining power foreign companies wield in the negotiation of participation agreements.

In Zambia for example, although the government had majority shares in the new joint ventures and was therefore entitled to appoint top management it could not do so. Instead the participation agreement included management contracts which gave the power to manage RCM and NCCM to management groups affiliated to RST and Anglo-American Corporation - the two companies that operated in Zambia prior to the participation agreement. In this respect therefore, it was not possible for the government to exercise adequate control over the management decisions affecting important issues such as production levels and levels of investments, as well as marketing policies.

An effective participation arrangement therefore, entails the conclusion of carefully drafted instruments of participation which would ensure a genuine control of issues such as production by the majority shareholder. In Zambia, the State would seem to have achieved this through a long but carefully planned path. First, it proceeded to change the articles of association of RCM and NCCM, and secondly, in 1973 abrogated the management contracts. Finally, in 1981 the process was made complete by the restructuring of the mining companies which resulted in the merging of the two companies into the Zambia Consolidated Copper Mines in which the state's equity share rose to 60.3 per cent.

V. Conclusion

The discussion in this chapter has highlighted the legal methods a developing country could employ in an attempt to gain control of the production process in their mining industries. It has been shown for example, that Zambia used various domestic legislation to reassert its ownership of minerals in an effort to recoup a greater share of the income generated through mineral production. It has also been shown that by the use of ordinary corporate principles the country was able to participate in the running of the mining companies and later completely control the production process. This has been possible because there is a wealth of legal principles that a state can domestically exploit to control mineral ownership, taxation, and mineral production.

It should be emphasized however, that state ownership of minerals, good taxation laws, and state participation in production or even nationalization, will not ensure national control of the returns reaped from mining unless this is accompanied by control of the marketing aspects.

The problems of mineral marketing are linked to forces beyond the borders of any one mineral producing country. Indeed by the very nature of international mineral markets, the recently created mining corporations such as ZCCM in Zambia, remain highly dependent both in the short run and the long run upon forces well beyond the control of any single developing countries. Thus single nation domestic legislation approach such as has been used in Zambia to reassert mineral rights, to gain control of the production process, and to tax income from minerals, are unlikely to be successfully utilized to control the marketing stage of minerals.

As will be discussed in Chapter 3, many mineral exporting developing countries, including Zambia, have taken measures to try and exert some influence in the markets for their minerals by the creation of national mineral marketing corporations. For example, all important copper exporting developing countries have set up national copper marketing corporations charged with the responsibility of marketing their copper. Chile has set up CODELCO, Peru has organized MINERO-PERU, Zambia has set up MEMACO, and until recently Zaire marketing its copper through SOZAMIN. These distributive organizations were all set up with the aim of achieving in the long run, some measure of independence from the private copper marketing firms and establishing their own independent relations with purchasers. An argument will be advanced in the next chapter to suggest that the legal basis and institutional framework of these national marketing corporations are ill suited to tackle the transnational problems of mineral marketing which are immensely complex.

Although the balance of power has now shifted from the transnational corporations to the state in mineral producing developing countries like Zambia, in as far as mineral ownership and production is concerned, these countries are still confronted by and at the mercy of oligarchically organized purchasers when it comes to the issue of marketing of the minerals.[48] Furthermore, these national mineral marketing corporations have a disadvantage of having to conduct their business within the framework of existing international rules and principles that govern the marketing of minerals, which to say the least, reflect the lack of bargaining power by the mineral exporter.

Later chapters will examine existing international legal rules, principles and institutions dealing with issues of mineral marketing in general and copper marketing in particular with a view to advance a thesis that will advocate the creation of new, more imaginative and internationally acceptable principles, agreements and institutions to govern issues of copper marketing. It is hoped that the recommendations made in the thesis will be applicable to other base metals.

---

48. P. Hawkins (ed.), Research in International Business and Finance. (1979) Volume I, Jai Press Inc., pp. 289-293.

CHAPTER THREE

THE LONDON METAL EXCHANGE AND THE MARKETING OF ZAMBIAN COPPER

I. Main principles behind international commodity markets

The generally agreed principles of international trade policy after the two world wars leaned heavily against intergovernmental intervention in the free working of commodity markets except on a temporary and exceptional circumstances.[1] The basic assumption behind these principles was the belief that the free working of commodity markets would, under normal circumstances, provide an optimum allocation of the world resources. This assumption had a further assumption that the optimum allocation of resources would be attained through perfect competition in the commodity markets and free resource mobility between countries. The legal exposition of this philosophy was later embodied in the General Agreement on Tariffs and Trade (GATT) which required international trade to be conducted on the basis of the "most-favoured national treatment", without discrimination, and on the basis of reciprocity.[2]

These principles, however, proved inadequate to tackle the primary commodity marketing problems. A number of private international arrangements continued to be entered into in an attempt to stabilize commodity markets. In the

---

1. A.K. Koul, The Legal Framework of UNCTAD in World Trade, (1979) A.W. Sijthoff, Bombay, p.75.
2. Article 2 of the General Agreement on Tariffs and Trade (GATT)

case of copper, a number of private international arrangements had been entered into since the 1880s and had continued in one form or another well into the period after the war. Examples of these cartel like operations aimed at control of the international copper markets included the Secretan Syndicate which operated between 1886 and 1888, the American Producers' Association of the 1890s, the Amalgamated Copper Company (1890s), the Copper Export Association (1918 to 1923), the Copper Exporters Incorporation (1928 to 1929), and the International Copper Cartel which began operating in 1935 and operated intermittently until World War Two.[3] These developments had highlighted the peculiar nature of commodity markets which made it impossible for them to function effectively under the free market philosophy. After the Second World War therefore, attempts were made to find acceptable legal controls for commodity markets. The one single most important attempt was made at the United Nations' sponsored Havana conference in 1947 to 1948, which was called to debate the draft charter for an International Trade Organisation.

Chapter six of the draft Havana Charter recognized the instability inherent in international commodity markets and provided legal mechanisms for controlled intervention by intergovernmental consultations and actions. The important aspect of the principles enunciated in chapter six of the Havana Charter was that such principles had to be used only in exceptional cases and for purposes of price stabiliz-

---

3. K.W. Clarfield et. al., Eight Mineral Cartels, (1975), p. 79.

ation.[4] Although the Havana charter was never ratified, its principle tenets regarding international trade in commodities have remained very much effective in shaping the system of international commodity law. This was achieved mainly through the framework of the United Nations, which through various resolutions of its organs recommended the resurrection of those principles and their use in future arrangements regarding international trade in commodities.[5] One of the important principles suggested to control the peculiar behaviour of international commodity markets under chapter six of the Havana charter was the creation of special intergovernmental commodity control agreements involving both producers and consumers. Such agreements were to attempt to stabilize commodity markets without significantly departing from the market forces of supply and demand.[6]

The basic assumption behind the Havana principles is that the instability experienced in international commodity markets is a result of the special nature of demand and supply patterns experienced by all primary commodities, and which patterns cannot be adequately explained through economic theories.[7] To support this view, it is further

---

4. See draft Havana charter, chapter VI, Article 55. Also F. Parkinson, "The United Nations Integrated Programme for Commodities" (1981) *Current Legal Problems*, p.259.

5. See for example, The United Nations Economic and Social Council (ECOSOC) resolution ~~s~~ 512 A(XVII) of 30th April, 1954; resolution 30(IV) of 28th March 1947; and resolution 28-D(XVIII) of 5th August 1954.

6. Article 57(c) of the draft Havana charter

7. Cheryl Payer, Commodity trade of the third world, (1975) MacMillan Press p.169.

argued that because of this somewhat peculiar pattern of demand and supply, very few primary commodity markets have ever been freely competitive. They have always reflected intervention in one form or the other by private enterprises in the form of cartels and by governments in the form of inter-governmental commodity agreements.[8]

These assumptions, though significant, fail to take into account the role of commodity marketing institutions themselves in the destabilization of the markets. Without taking into account these factors, it is difficult to see how international legal controls of commodity markets can succeed in checking the mercurial behaviour of such markets. It should be pointed out here that the measures contained in the Havana charter and which still form the basis of the legal controls of commodity markets stop short of dealing with the problems that are a result of the functioning of the various marketing institutions and their chief actors. In this chapter an argument will be advanced to show how the institutional structures of commodity markets and the participants on those institutions may cause instability in the markets. In so doing, it is hoped that we would highlight the inadequacy of stabilization measures such as those recommended in the Havana charter. No attempt will be made to examine all international commodity markets since most of them are not relevant to this study. The discussion here will be limited to the examination of international markets for copper with particular emphasis to the London Metal Exchange (LME).

---

8. A.K. Koul, <u>supra</u> at p.75.

II. The nature of international copper markets

A large percentage of copper traded internationally is produced in the developing countries. These countries account for over 60% of total world exports of copper.[9] The world copper marketing institutions are therefore of great significance to all copper producing developing countries. The significance of these institutions to any one country varies with that country's dependence on the exports of copper. In the case of Zambia, these institutions are of great significance since copper exports account for over 90% of its total exports, and 93% of its total foreign exchange earnings.[10]

There are two ways in which copper is traded internationally. It is either sold on commodity exchanges, the most important of which is the LME, or it is traded through special contracts entered into between buyers and sellers. The bulk of the copper exported by developing countries is sold by means of the second method, that is to say, directly to fabricators and only marginal amounts are sold through commodity exchanges. In fact a country like Zambia does not sell any of its copper through commodity exchanges but only directly to fabricators.[11] Although only marginal amounts of copper from developing countries are traded on international commodity markets, these markets remain very significant because the prices fetched here tend to dictate the prices that can be fetched elsewhere.[12] In this

---

9. GATT press release No.GATT/1295 of 9th September 1981, p.18

10. See The Republic Zambia, <u>monthly digest of statistics</u>, vol. XVI, nos. 10-12.

11. This point was raised by Mr. Kataya the research manager at MEMACO Services Ltd. London, in an interview with the writer in July 1982.

respect therefore, the importance of the LME lies in the fact that any copper sales made by Zambia directly to consumers must reflect as closely as possible the prices quoted on the LME. What this means in effect is that any instability in this institution inevitably means instability in the earnings of a copper exporting developing country.

III. Institutional structure for the London Metal Exchange

The LME is an important institution to copper exporting developing countries not so much because their copper is physically traded there but because of its ability to fix copper prices which are followed closely in all other international transactions. This being the case, it is necessary to understand its institutional arrangements because any instabilities in a commodity market can in a way be said to be a reflection of its institutional arrangements. To devise legal mechanisms to control such instabilities without paying due regard to the institutional structures in the market as the Havana principles suggest, would seem to be a futile exercise.

The most important aspect of the institutional structure of the LME are its members because participation in the important functions of the exchange is limited to members of the exchange.[13] Membership of the LME is broken

---

12. Raymond F. Mikesell, The World Copper Industry, (1979) John Hopkins University Press, Baltimore, p.81.

13. Rule no. 1, Part one of the London Metal Exchange rules and regulations.

down into three categories. The first category comprises of what are normally termed the commercial users. This includes those firms or companies that either produce or refine copper, and dealers. The dealers ~~being~~ are those firms and companies that act as middlemen in the distribution of copper from producers to consumers. The second category of members comprises of those firms and companies that are neither producers nor consumers but are agents of such companies. The final category comprises of professional traders who belong to the exchange for purposes of trading on their own account.

For a firm or company to qualify as a member of the exchange in any of the three categories, it must be able to be represented by what are termed subscribers.[14] There are two categories of subscribers on this exchange. First, there are the representative subscribers who are required to be persons of over 21 years of age, directors of a company or partners in a firm, whose company or firm is incorporated and domiciled in the United Kingdom. The person eligible for election as a representative subscriber must be able to show that the company he represents has at least one of its directors domiciled in the United Kingdom or that the majority of the partners in his firm are domiciled in the United Kingdom. The second type of subscriber is the individual subscriber who is required to be a person nominated by a trade organization connected with the metal industry, or director of a company or partner

---

14. Ibid., rule 1.

in a firm which for one reason or another does not qualify him to the status of representative subscriber.[15]

It is only those companies that satisfy the additional requirement of having a representative subscriber or individual subscriber that qualify to become members of the exchange. The significance of the distinction between companies and firms represented by representative subscribers or individual subscribers becomes apparent when one examines rule 15 of part one of the rules and regulations of the exchange. This rule makes it clear that only those companies and firms represented by representative subscribers are permitted to deal in the ring. The importance of a company being able to deal in the ring will be examined later on in the chapter. It suffices here to point out that these membership requirements create two broad categories of members, that is those firms and companies that are able to deal in the ring and those that are members of the exchange but cannot deal in the ring.

Since ring dealing members of the exchange are required to be companies or firms represented by representative subscribers, incorporated or domiciled in the United Kingdom, and having either one of its directors domiciled in the country or the majority of its partners domiciled in the country, the marketing enterprises of copper exporting developing countires have not been able to qualify as ring dealing members of the LME.[16] The inability of these national marketing corporations to qualify as ring dealing

---

15. Ibid., rules 6(a) and 6(b).

16. London Metal Exchange membership list as of July 1982.

members on this exchange stems from their legal nature. For example, the Zambia Metal Marketing Corporation (MEMACO) is a subsidiary of the Zambia Industrial and Mining Corporation (ZIMCO) which is incorporated in Zambia. The Zambian Companies Act requires the majority of directors of any company incorporated in Zambia to be domiciled in Zambia. Thus although MEMACO has an office in London, it is in effect a company incorporated in Zambia and does not therefore qualify to deal on the ring. It has however qualified as a non dealing member represented by an individual subscriber.[17] The significance of the inability of copper producing developing countries to qualify as ring dealing members of the Exchange becomes apparent when one examines the functions performed by the Exchange.

IV. International copper price setting

Only a small percentage of copper exchanged internationally by copper exporting developing countries is actually traded on the LME. Some of the developing countries like Zambia do not sell any of their copper on the exchange.[18] Despite this, the LME performs one basic function of vital interest to copper exporting developing countries. This function is one of setting the price for the commodity.

The role of the LME as a price setting institution appears to be based on the traditional economic theory that a commodity exchange is ruled by the forces of supply and demand which in turn set out a true price for a commodity.

---

17. Ibid.
18. An interview with Mr. Kataya. See footnote 11.

The operating mechanisms for price setting on the LME, as far as copper is concerned, are the copper contracts. The most important contract on this exchange is the "futures contract". This form of contract entails a firm commitment by a buyer and seller to deliver and receive respectively, a specified amount and quality of copper at a designated future date. The contract is usually entered into like any other contract of sale, when an offer by the seller is accepted by the buyer. Offers and acceptances are usually made through open outcry made across the exchange ring.[19]

The parties capable of entering into a futures copper contract on the LME must be members of the Exchange who are permitted to deal on the ring. It will be observed here that the copper producing countries do not qualify as ring dealing members of the exchange. This means that these countries cannot enter into a futures copper contract by way of an open outcry at the Exchange.[20] It is however, possible for a marketing corporation of a copper producing developing country to enter into a contract of sale with a ring dealing member of the Exchange outside the ring. Such a contract does not however, automatically fall within the LME contract regime unless both parties agree that it falls within that regime.[21] For purposes of this chapter, we shall not go into the details of this second type of contract because it is of little significance as far as the copper price setting is concerned. Our discussion here will be

---

19. Rule 17 of the LME rules and regulations.
20. Ibid., rule 15.
21. Ibid., rule 30 part I(a).

limited to the copper contract entered into between ring dealing members of the exchange, because it is this type of contract that is crucial to the price setting process.

The terms of the copper contract entered into between two ring dealing members, that is other than the price are standardized, as is evident from a casual perusal of the LME standard form contracts. What becomes the subject of offers and acceptance across the floor of the Exchange are the prices and the quantities to be paid and delivered respectively. Once agreement has been reached on the two issues, a contract is concluded employing the terms contained in the standard form contract for copper.

There are basically four standard form copper contracts on the LME depending on the quality of the metal being contracted for. There is one for electrolytic wirebars, one for electrolytic cathode, one for higher grade copper, and one for fire refined copper. The copper delivered under the four contracts must meet the quality specifications contained in the respective standard forms of contract. All the other terms of the four types of contracts are similar and cover issues such as weight, settlement on the due date, warranty, and dispute settlement.[22] Of particular interest to our discussion in this chapter is the question of dispute settlement which will be discussed below.

As stated earlier, the prices of copper on the LME are arrived at when ring dealing members enter into contracts by way of an open outcry. At the end of the day the average of

---

22. See specimen contracts in part 5 of the LME rules and regulations.

the prices fetched in the various contracts become the ruling prices for copper sold elsewhere for the day. Thus for example, if on day A the average prices fetched at the LME is £800 per ton, a contract for the sale of copper entered into between say MEMACO and a Japanese fabricating firm on the same day will usually quote that price as the basis of the transaction. In this process therefore, the parties represented on the ring play an important role of influencing the price that a copper exporting country would receive in its transactions elsewhere. The apparent danger in this arrangement is that the prices arrived at on the LME may not necessarily reflect the forces of supply and demand but may be influenced by the interests of the various ring dealing members. Indeed a number of studies have shown that there is a great danger of prices of commodities being influenced by a few companies taking control of dealings on the exchange. This has been shown to occur through a process called the "squeeze". A "squeeze" is said to occur when one or more influential traders control a substantial segment of the contracts traded on the exchange floor as well as a sizeable portion of deliverable supplies and uses the control of these two vantage points to alter future prices.[23]

If the dangers of the LME being manipulated by the parties involved in the formation of the copper contracts are real, as they seem to be, then two issues arise. First,

23. See for example, Clairmonte and J. Cavanagh, The World in Their Web (1981) London, pp. 53-68. Also see UNCTAD, "Marketing and distribution of tobacco", Doc. No. TD/B/C.I/205 (1978).

it becomes important to determine whether there are any legal controls aimed at regulating the activities of those represented on the ring and whether such controls are effective. Secondly, whether the intergovernmental regulations employed in relation to commodity trade do effectively penetrate the internal arrangements of commodity markets. Our discussion in this chapter will be limited to the first of these two points leaving the second point for discussion in the next chapter.

V. Regulatory controls over the activities of the LME

As mentioned above, the most important aspect of the functions of the LME is that of copper price setting. The important actors in this process are the ring dealing members. Of significance about the ring dealing members are the membership rules which exclude the marketing institutions of developing copper exporting countries. Lack of participation by these countries means they cannot influence adequately the operations of the market although the prices set there greatly affect their income from their copper exports. Since the participants on the Exchange price setting process are firms and companies which have an interest in the copper industry but not necessarily producers, it is possible for the Exchange to be used to the detriment of the producing countries particularly those in the developing world. If this be the case, it becomes necessary to determine whether there are adequate regulatory controls that seek to minimise such possible abuses on the Exchange.

Basically a commodity Exchange is subject to the domestic laws of the country where it is situated. Within that domestic jurisdiction, the Exchange is then either self regulatory through its own rules or is subject to an independent regulatory agency. In the United States for example, all commodity Exchanges are regulated by an independent federal regulatory agency called the Commodity Futures Trading Commission (CFTC). The creation of this Commission in 1974 appears to have been a recognition of the view that the best control of a commodity Exchange domestically, lies in an independent body which is charged with the responsibility of overseeing the activities of all the commodity Exchanges. At the Congressional hearings in 1973, various witnesses testified that there had been a significant increase in the incidents of abusive practices on all the commodity markets in that country.[24] As a result of these reports, the congressional committee concluded that self regulation could not continue to function in the commodity industry without a strong federal regulatory umbrella over self regulatory activities of the commodity markets. Since 1974 therefore, the Commodity Exchange Act[25] in that country provides for governmental control over all commodity markets. The main aim of this governmental control is to provide governmental surveillance of the commodity exchanges for purposes of making sure that they function properly and are free from manipulation by those represented on the exchanges.

---

24. United States Senate Reports, No.1131 (1973) at page 33.

25. The United States Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463 Stat. para 1389.

The basic assumption here being that it is only through some kind of governmental supervision that commodity Exchanges can reflect as accurately as possible the basic conditions affecting a commodity and therefore perform their price setting function in a fair manner.

In the case of the United Kingdom in which country the London Metal Exchange is situated, parliament has left control over commodity exchanges in the hands of the Exchanges themselves. The philosophy in this country favours self regulation by the commodity Exchanges. This had not always been the position because as early as 1947, the Bank of England had obtained general supervisory responsibility over all commodity markets and exchanges.[26] Under the Exchange Control Act of that year, the Bank of England was given powers of surveillance over the activities of all commodity exchanges in the United Kingdom. In October 1979, however, an Act of parliament was passed repealing the provisions applying to the regulation of commodity Exchanges under the 1947 Act. This meant that the Bank of England no longer had supervisory authority over the activities of the London Metal Exchange. Thus although unofficial consultations do occur between the Bank and the Exchange regarding such matters as the degree of speculative activities on the exchange and its effect on the financial integrity of the market, all regulatory controls on the activities of the Exchange are essentially self imposed and self administered.[27]

---

26. See the United Kingdom Exchange Control Act of 1947. 10 and 11 Geo. 6, C.14, section 1.

27. Christine A. Rock, "Regulatory control over the United States, Canadian, and United Kingdom futures markets", (1982) Business Lawyer, No.2, p.613 .

The advantages of the regulatory system employed in the United States lies in the fact that a developing country utilizing the commodity Exchanges in that country can be able to influence the activities of the Exchanges by means of intergovernmental consultations or through diplomatic means. The self regulatory regime of the London Metal Exchange, on the other hand, would seem to make it difficult for this avenue to be used. Since the critical issue for the developing countries exporting copper is the stability of the London Metal Exchange which for the most part determines the prices their copper would fetch, self regulation does not seem to provide these countries with a machinery through which they could exercise a measure of control on the activities of the exchange. To understand the shortcomings of the LME regulatory regime, it is necessary to examine various rules and regulations governing the conduct of business, contract formation and dispute settlement on the exchange.

VI. The London Metal Exchange Contract

The most important instrument used for copper price setting on the LME is the so called copper contract. This contract is entered into between ring dealing members of the Exchange during the times set aside every day for purposes of copper trading. It should be recalled that marketing institutions of copper exporting developing countries do not qualify under the Exchange rules to deal on the ring. This means that such institutions cannot enter into the copper contract as defined by the Exchange rules and regulations.

The inability of copper producing countries to enter into such contracts is regrettable particularly when one considers that it is the average price of the prices quoted in these contracts which eventually forms the basis of the price of copper for any one given day. For a copper exporting developing country therefore, participation in this price setting process is of critical importance. To determine the best approach of increasing the producer countries' bargaining leverage on the Exchange, it is necessary to examine more closely some of the rules governing the copper contract.

(i) Nature of the contract

One of the significant aspects of the LME copper contract is that it is in the form of a standard contract. The contract basically deals with three issues of importance to this discussion. First, it specifies the quality of the metal to be delivered, that is to say, whether it is high grade copper, cathodes, wirebars, or fire refined copper.[28] The important issue about quality specifications in the copper contract lies in the fact that all the copper sold on the LME must conform to certain specifications. These specifications do raise problems to a country wishing to market copper of different specifications. Such a country would find it difficult to quote the LME prices because that exchange does not deal with contracts for the delivery of copper other than in the specified form. This problem

28. See the revised copper contracts, part 5 of the LME rules and regulations.

has already affected blister copper produced by Papua New Guinea.

A second aspect of the quality specification relates to marketing problems that may face a country wishing to export copper of higher quality specification than those mentioned on the LME contract. Since the contracts are rigid in their quality specifications, an attempt by a copper producing country to market copper of a higher grade than that specified in the contracts is bound to lead to the problem of determining the appropriate price for such copper. In recent years, the Intergovernmental Council of Copper Exporting Countries (CIPEC) has been canvasing the LME to change its quality specification rules to allow for other grades of copper to be included on the copper contract.[29]

The second issue specified in the LME copper contract are the settlement terms. Under these terms, the contracts are required to specify the quantities involved in multiples of 25 tons, at the price ruling on the Exchange on the day of delivery or the day the contract is concluded. It should be pointed out here that this requirement provides an option to the buyers and sellers to quote in their contracts the price of copper ruling on the day of the contract or the price ruling on the day the contract is settled. This option works in favour of speculative tendencies on the market which ultimately have the effect of further destabilizing the market. Since the LME is for all practical purposes a price setting institution for copper, the destabilizing effects

29. This point was raised by Mr. Peter Parkinson, Director of marketing policy for CIPEC in an interview with the writer. Interview conducted in Paris in December 1982.

resulting from speculative activities tend to be felt mostly by the developing countries producing copper. The Intergovernmental Council of Copper Exporting Countries (CIPEC) has in recent years been advocating a change in this LME contract requirement. It has called for the use of monthly average prices as the basis for all copper contracts entered into by its members.[30]

(ii) Agency rules on the LME

Parties to a copper contract on the London Metal Exchange deal with one another as principals and are therefore entitled to claim against one another only for the fulfillment of the contract.[31] This rule applies to a situation where a ring dealing member enters into a contract on behalf of a principal who is not a ring dealing member. Under the English common law of agency, a ring dealing member acting as an agent of a non ring dealing party would be regarded as a disclosed agent who would not be subject to contractual liability in the event of his principal in the transaction defaulting.[32] This does not seem to be the position under the exchange rules and regulations. Under these rules and regulations, such a member is liable to the opposite party in the transaction as principal even though they may have acted as agents.

Since LME ring dealing members who represent non dealing parties in the copper contract are regarded as

---

30. Ibid.
31. Rule A, part 2 of the LME rules and regulations.
32. Clarkson, Booker Ltd. v. Andjel [1964] 2 Q.B. 775

principals, the performance of their duties as agents are bound to be impaired. One of the important duties of an agent under English common law is that of carrying out his principal's instructions. If the agency arrangement is for consideration, as most LME agency relations are, the agent must carry out any express instructions given to him by his principal, even though he may reasonably believe that in departing from them he would be promoting his principal's interests.[33] But since on the LME such an agent is solely responsible for the fulfillment of the contract, the agent is bound to follow those instructions which he can personally meet in the event of the principal defaulting. In these circumstances, the powers of the agent become very great in the sense that he can determine what instructions of his principal he would follow and which he would not.

This somewhat strange rule has important consequences on the position of the copper producing developing countries. As mentioned earlier these countries are precluded from participation on the LME in the capacity of ring dealing members. This preclusion means that the only avenue open to them within the framework of the LME to influence the copper market is through participation as non-ring dealing members. In this capacity they can participate in the price setting mechanism of the exchange by using the ring dealing members as their agents in the copper contracts. The agency rules on the exchange however, seem to erode the powers of

---

33. <u>Larsen</u> v. <u>Anglo-American Oil Company Ltd</u>. (1924) 20 LL. L. Rep. 39 at page 67.

the principal to control his agent. This makes it extremely difficult for the marketing institutions of copper producing countries to exert any substantial influence on the copper price setting institution on the LME. The control of the price setting mechanism seems to lie squarely on the ring dealing members who cannot be said to represent the interests of producer developing countries. In such a situation, the likelihood of these members manipulating the exchange to their own interest and in some cases to the detriment of the producer countries cannot completely be excluded. To minimize the incidents of market manipulation by ring dealing members, the LME's self regulatory regime has prescribed certain rules to be followed by the ring dealing members. The efficacy of these rules are certainly doubtful. The rules aimed at minimizing manipulation of the market give power to one organ of the Exchange to monitor the activities of the ring dealing members. This organ is the monitoring committee which will briefly be discussed below.

VII. The Metal Exchange Monitoring Operation (MEMO)

The LME has established a monitoring operation which aims at providing a supervisory arrangement over the activities of its ring dealing members. The monitoring activities are conducted by the monitoring committee which consists of three members drawn from a committee of subscribers.[34]

The basic aim of this committee is to monitor the contractual position of the ring dealing members, so that

34. LME rules and regulations, part 4 rule 1.

it can determine at any one time whether a ring dealing member's contractual obligations exceed what is justified by his financial position and therefore distorting the free interplay of the market forces.[35] The Monitoring Committee achieves this purpose by requiring all ring dealing members to report all contracts they enter into under the standard contract terms of the Exchange.[36] All such contracts have to be reported to a designated computer bureau by the close of each trading day.[37]

In the event of a ring member carrying positions which are above what is justified by his financial position, the committee is entitled to take one of two steps. Either to require the member to increase his basic permitted indebtedness or to deal with such a member summarily by way of imposing a fine not exceeding £100 or suspending the member from the ring for fourteen days.[38] In the event of a member repeatedly contravening these rules, the committee is empowered to refer the matter to a joint committee of the directors of the exchange and committee of subscribers. This joint session has the power to fine such a member, the fine not exceeding £5000, suspend his membership or even expel such a member from the Exchange.[39]

The interesting aspect of these regulatory controls is that they seek to remedy the situation after it has occurred and not before. When a member is fined, suspended, or

35. Ibid., rule 4(1).
36. Ibid., rule 4(1).
37. Ibid., rules 3 and 4(4).
38. Ibid., rules 4(10) and 5(3).
39. LME rules and regulations, part 1 rule 27.

expelled, his activities will have already destabilized the market and the effect will have already been felt by producing countries. A fine for such a member or indeed expulsion are of little consolation to a copper producing country which might be experiencing foreign exchange difficulties as a result of such a member's market manipulation activities. Secondly, if the offending member is an influential member of the exchange, the likelihood of the various disciplinary committees being influenced by such a member cannot be ruled out. This indeed appears to be one of the serious shortfalls of any self regulatory system. An independent regulatory system such as that existing in the United States would appear to be more suited to the control of market manipulation.

VIII. Arbitration procedures

Generally there are two ways in which commercial disputes are settled. They are either settled in ordinary municipal courts or through arbitration. Where an international commercial transaction is referred to adjudication in a court of law within a particular country, the crucial legal issues that usually emerge as preliminary issues are questions of jurisdiction and the applicable law.[40] Most international commercial disputes however, tend to be referred to arbitration. This is because arbitration appears to have several advantages over court adjudication. Businessmen regard arbitration as simpler, and less subject to rules

40. A.F. Lowenfeld, International private trade,(1977) Mathew Bender, Revised edition p.80.

of procedures and evidence that tend to vary from place to place. This is particularly true where foreign parties contemplate litigation in foreign courts whose procedures might be wholly unfamiliar to them. It is perhaps because of the relative ease of arbitration over adjudication that the LME prefers to refer all disputes arising out or in relation to the exchange contracts, to arbitration. In this respect every ring dealing member of the exchange entering into a contract within the framework of the LME implicitly accepts to refer any dispute to the arbitration procedures set out in the Exchange's rules and regulations.

The rules for arbitration on the London Metal Exchange involve first the notification of the dispute to the Executive Secretary of the Exchange who in turn shall refer such a dispute to two arbitrators. The two arbitrators would be appointed by the two parties to the dispute, that is to say, each party appointing one member. The arbitrators are drawn from a panel of arbitrators nominated by the exchange. The two arbitrators have the power to appoint a third arbitrator also nominated by the Exchange.[41]

The place of arbitration in the case of dispute between parties to a LME contract is required to be London.[42] The place of arbitration is significant not only because ring dealing members of the Exchange are required to be domiciled in the United Kingdom, but also in terms of the applicable law and the availability of judicial review. In terms of the

---

41. LME rules and regulations, rule 1, part three.
42. See Raymond F. Mikesell, *supra* at page 80.

British Arbitration Act of 1950, the arbitrators may make findings of fact and render a provisional award based on their view of the law. this award would be subject to review of the legal issues by the High Court . . with the possibility of appeal to the Court of Appeal or even to the House of Lords. The advantage of having a judicial review of arbitral decisions appears to lie in the fact that an opportunity is created for an external check on the self-regulatory system employed by the exchange. A member of the exchange can through this procedure challenge the legality of the exchange's rules and regulations whenever they result in absurd and unfair decisions.[43] This procedure would seem to be of interest to copper exporting developing countries should they be able to participate on the LME in future. But the availability of judicial review as an advantage should not be overemphasized because in certain cases it may tend to discourage compromise between parties, which is supposed to be the essence of arbitration.

IX. Copper marketing outside the LME framework

As explained in the earlier sections of this chapter, international sales by copper producer countries are based on the LME prices. The basis for the determination of these prices are the LME copper contracts. A substantial portion of international copper sales are however, made outside the framework of the LME contract regime. The later sales are made through a variety of contractual arrangements between the producers and the consumers. The basic features of these contracts are such factors as the date of delivery, the price

43. This judicial review is now restricted to matters of law by Article 1 of the 1979 Arbitration Act, Halsbury's Laws of England, Annual Abridgement 1979, para 135.

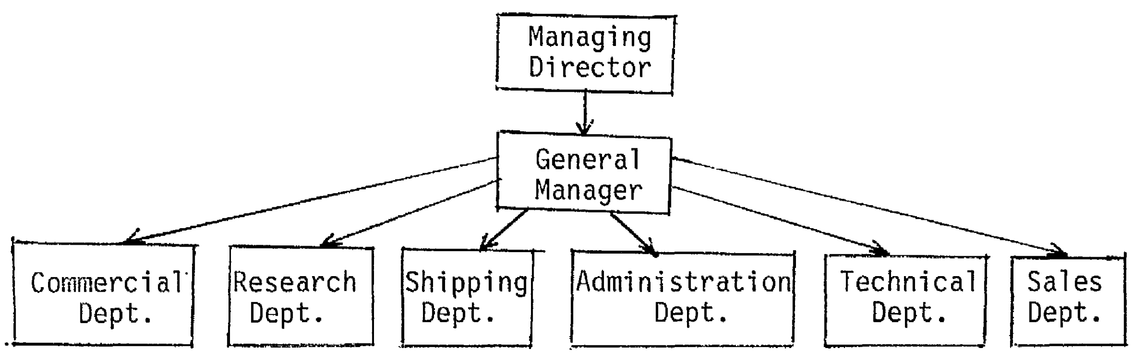
for the particular grade of copper, a force majeure clause, and shipment arrangements. One significant factor however, is that these contracts quote or follow closely the prices of copper set on the LME. One country that employs this later type of contract is Zambia.

The sole marketing institution for Zambian copper on the world market is The Zambia Metal Marketing Corporation (MEMACO). This is a subsidiary of the Zambia Industrial and Mining Corporation (ZIMCO) which is charged with the overall responsibility of supervising all industrial and mining activities in the country. MEMACO is charged with the responsibility of conducting all international copper sales on behalf of the Zambia Consolidated Copper Mining Company (ZCCM). Prior to the formation of ZCCM, MEMACO sold all the copper produced by the two predecessors to ZCCM, that is to say the Nchanga Consolidated Copper Mines Ltd., and Rhokana Copper Mines Ltd. At that time this arrangement was made possible by the conclusion of sales agreements between MEMACO and the two mining companies. Recently MEMACO has negotiated a new sales agreement with the new company, ZCCM. The terms of this agreement involve mainly provisions dealing with the commission accruing to MEMACO in its capacity as a sales agent for ZCCM. The commission accruing to MEMACO from the sales of copper is at the rate of 0.25% for copper and 2.0% for cobalt.

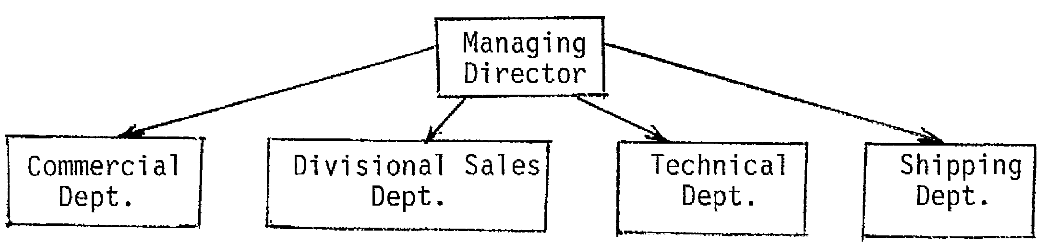
X. The Zambia Metal Marketing Corporation

MEMACO maintains two offices, one in Lusaka and another in London. The head office is in Lusaka and the services office is based in London. The main function of the head office in Lusaka is to monitor all the sales activities of the corporation and to conclude all contracts of sale with the consumers. The London office on the other hand, carries out the terms of the contract as they affect the corporation. The structure of the corporation is illustrated by the organisational chart below:

(a) <u>Lusaka office</u>



(b) <u>London office</u>



(i) <u>Contracts for the sale of copper by MEMACO</u>

Contracts for the sale of copper are negotiated annually between MEMACO on the one hand and the major consumers of Zambian copper. The pattern of these negotiations is well established and the major perimeters of the contracts are well established. Only a few variables that include the quantity and manner of payment vary from one year to the other. In the negotiation of these contracts there is usually no prices involved because Zambian copper is sold on the basis of the LME prices, although depending on the quality of the metal as well as the service provided, a commission or premium is usually negotiated and added to the quoted LME price.

(ii) The terms of the contracts

The contract terms are more or less standardized and include quality specifications, quantity, period of delivery, and the premium. The price quoted in these contracts is usually the average price of the LME prices for the month in which the copper is to be delivered. It will be observed here that the contract terms used by MEMACO in as far as price is concerned differ slightly from that utilized by the LME. On the LME, contracts provide the buyer with an option to employ any price prevailing between the date of delivery and say three months following shipment. In these circumstances the buyer obviously has advantage in being able to choose the date on which the price is lowest. If MEMACO was to employ this formula, it would put itself at the mercy of speculators and the resulting price fluctuations and possible loss of sales revenue. To avoid these disastrous consequences, copper producers who are members of CIPEC have recently been discussing the adoption of a uniform contract which would give the buyer less leeway in selecting the quotation period for the contract.[44]

---

44. See Chairman's statement in MEMACO Annual Report (1978) at page 4.

The second important term in the MEMACO contract is the force majeure clause. This clause is generally written into a contract to prevent either party to a contract being liable to the other for inability to meet contract terms due to circumstances beyond their control. This clause proved very useful to Zambia recently. In 1978 for example, Zambia declared a force majeure of 15% on all copper sales in conjunction with the marketing companies of Peru and Zaire, in order to tackle the problem of world surplus in stocks which threatened to further depress copper prices.

Although Zambia through its marketing corporation, MEMACO enters into independent sales contracts for the sale of copper, the prices quoted in these contracts reflect the prices ruling on the London Metal Exchange. This means that any fluctuations or instability in the copper prices on this exchange will inevitably be reflected in the prices fetched in the independent copper contracts entered into by MEMACO. The terms employed in the MEMACO contract though slightly different from those of the LME copper contract, do not go far in checking the basic problem facing international copper markets, that of price instability.

XI. Conclusion

The inherent instability in the international copper markets has long been a recognized fact. As far back as the period of the war, efforts have been made to stabilize the prices and markets for copper. The basic legal principles that have been employed in an effort to stabilize these markets have been in the form of intergovernmental commodity stabilization arrangements or producers associations. The question is whether these legal mechanisms have really attempted to tackle the source of these instabilities. In this chapter attempt has been made to examine the important copper price setting institution, the LME, and its possible contribution to copper price instability. This examination was made with a view to attempting in the next chapter, to determine whether the legal mechanisms for commodity market stabilization do actually take into account the role played by marketing institutions themselves in the destabilization of the prices.

As far as Zambia is concerned, an examination of the London Metal Exchange's institutional structure, functions, contracts, and regulatory controls, reveals that country's lack of control of an institution that determines its copper prices. Although the country has now reasserted its right to market its own copper by the creation of MEMACO, the sales contracts it employs do not give it control over the pricing of its copper.

CHAPTER FOUR

INTERNATIONAL COMMODITY AGREEMENT MECHANISM

I. Copper price instability and the search for a solution

As revealed in Chapter 3, Zambia's lack of control and non-participation on the LME means that it does not exercise any considerable influence on the price fetched by its copper. This price is determined by the various interest groups represented on the LME. Since the interests of these groups may not in many cases reflect the interests of Zambia as a producer, the price arrived at may not always represent a fair price to Zambia. The group interests on the exchange may through collusive action push prices up or down depending on what appears to suit their interests. The dictates of these interest groups on the LME find expression in persistent instability in copper prices which in turn translate themselves into unstable export earnings for Zambia.[1]

Although it is usually assumed that the LME is based on the principle of free competition and that this competition would produce equivalent advantages for both producers and consumers,[2] its institutional set up and rules employed

---

1. For a discussion of market organization and instability see L.N. Rangarajan, Commodity Conflict: The political economy of international commodity negotiations.(1978) Croom Helm, London, p.203.

2. Stuart Harris, "The commodities problem and the international economic order: what rules of what game?" In Peter Oppenheimer (ed.), Issues in international economics.(1980) , Oriel, London, p.199.

produce quite the opposite result. This combination is in many ways a result of unequal bargaining power between producers like Zambia and consumers on the LME. For Zambia to get a fair price at the LME therefore, one of two things have to be done. Either it should be allowed to join the Exchange together with other producers so as to increase its bargaining power or some kind of corrective mechanism should be found to curb the undesirable activities of the Exchange. As discussed in the last chapter, the LME arrangements make it impossible for the first option to be employed. This leaves us with the option for some kind of corrective measures. The question however is what kind of measures.

At the national level, there is at least one mechanism that can effectively be employed to safeguard the interests of a weaker trading partner. Legislation can be passed preventing economically stronger parties from adversely affecting the economically weaker groups in that society. Such social legislation may seek to curb restrictive or discriminatory commercial practices and aim at the redistribution of property to satisfy the elementary dictates of social justice.

For obvious reasons this legislative corrective approach cannot be practical in correcting the imbalance existing on the LME between producers and consumers of copper. The problem here is one that transcends national boundaries and therefore requires an international solution. The search for this solution has for many years now centred on a number of mechanisms. One of the possible solutions often suggested is the use of the international commodity agreement mechanism.

This chapter attempts to examine this mechanism and its possible use in the stabilization of copper prices.

II. Early attempts at copper price stabilization

International copper price stabilization efforts prior to the Second World War took the form of cartel arrangements. Cartels have beeh defined in a number of ways. Many writers who made studies before the end of the Second World War defined cartels as organizations or agreements involving a plurality of private enterprises, involved in business within the same industry, and whose main aim is the regulation or control of the commodity markets of interest to their industry.[3] In recent years a number of writers have extended the definition to include collusive price fixing arrangements by producer countries that exclude or do not take into consideration the interests of consumer countries.[4] This extension of the definition of cartel clearly intends to stretch the idea of a cartel

---

3. For various definitions of a cartel, see Ervin Hexner, International Cartels,(1945) University of N. Carolina Press, p.24.
Gottfried Haberler, The theory of international trade,(19(1937) New York p.327.
Professor Edward Mason, "The future of international cartels," (July 1944) Foreign Affairs., p.604.

4. See for example, Paul Hallwood, Stabilization of international commodity markets,(1979) Jai Press incorporation, Connecticut, USA, p.177.

to include marketing agreements not only of public agencies but also those established under intergovernmental agreements. Associations of producer countries have therefore been branded as cartels although strictly speaking not all of them disregard the interests of consumers. For our purposes the term cartel will be restricted to collusive action by private enterprises rather than intergovernmental control schemes involving producers.

Commodity cartels were first developed in response to expansion of primary commodity production during the inter-war years.[5] The demands for metals during the period meant new mines and plants were opened in a number of countries. After the war the commodity producers were in a position to produce far more than was demanded resulting in a steady decline of prices in international markets. It is through efforts to control this trend that cartels were established.[6] In the case of copper, a number of cartel arrangements have been entered into between various producers beginning with the dawn of the century. Thus for example a cartel arrangement in

---

5. See, United Nations Department of Economic Affairs, "International Cartels", 24 UN Pub. Sales No. 1948.II.D.2 (1947), p.5.

6. For a general discussion on the development of cartels, see Kopper, "The international reputation of cartels - current proposals", (1954) 40 Virginia Law Review, 1005.
Also, Koch, "Cartels as instruments of international economic organizations", (1945) 8 Modern Law Review, 130.

the form of the Amalgamated Copper Company was formed in 1900 with the aim of raising the prices of copper through the use of production cuts and supply management. Between 1918 and 1923 another copper cartel was in operation. This was the Copper Export Association covering a number of copper producing firms mainly those in the United States and Europe, and having as its main aim the regulation of copper prices through the use of export restrictions as well as stockpiling of the metal. Before the Second World War, two more cartel arrangements in copper operated. Between 1928 and 1929 the Copper Exporters Incorporation which included producers from the United States, Europe, and the Congo, was in operation. The main aim of this cartel was to boost copper prices through the use of export quotas and a system of producer prices. The last copper cartel before the Second World War was the international copper cartel which encompassed many copper producing countries outside the United States and aimed at regulation of copper prices.[7] For purposes of our discussion in this chapter, it is necessary to briefly discuss the nature of a cartel arrangements.

III. The nature of an international cartel agreement

Basically an international cartel agreements sets out a contractual system that would govern the relationship between

---

7. For amore detailed discussion of early copper cartels, See Heinrich Kronstein, The Law of international cartels (1973), p.154-156.

the parties. In most cases the aims of the cartel, the methods to be employed in achieving those aims, the institutional structure for the cartel, and dispute settlement procedures, are all stated in the agreement.

The most important aim of any cartel agreement is to regulate the markets for the commodity of interest to its members. Thus for example, the aims of the Copper Exporters Incorporation was stated in its agreement as to regulate the international copper markets with a view of raising copper prices. In addition to setting out the aims of the cartel arrangement, a cartel agreement establishes institutional devices that would be charged with the responsibility of implementing and enforcing the planned market regulation. The institutional arrangements for the interwar copper cartels were restricted to a council which was to meet as need arose to settle disputes between the parties to the agreement. In this regard, the binding nature of cartels becomes an important issue, their binding nature depends very much on whether the members of the cartel consider the provisions of the agreement as binding. The fact that it might not be enforceable under the domestic laws of some contracting parties is immaterial because such agreements, as a matter of fact establish their own legal order. It is because of this reason that some contractual relations not recognized in some domestic jurisdictions such as what are termed gentlemen's agreements, found a place in the concept of a contract under cartel agreements.

Another important aspect of a cartel agreement involves the methods prescribed in the agreement to control the desired market. The usual mechanisms embodied in cartel agreements to control the market, can be of three different types. First, a cartel agreement may provide for production cuts or production restrictions. In this regard production quotas may be allocated to the various members of a cartel. Such quotas are imposed so as to control the supply of a particular commodity on the international market. This supply restriction is then hoped to result in influencing the prices of the commodity. Secondly, a cartel might provide for the imposition of sales quotas. Under such an arrangement, each member of the cartel agreement would be required to sell its commodity only to the maximum of the quota allocated to it. The third mechanism used in cartel agreements is the producer price. Under this arrangement, the members of the cartel would agree to a producer price for their commodity thereby denying the market forces the right to set prices.[8]

IV. Evaluation of the inter-war copper cartels

There are three basic issues that lay at the core of the inter-war copper cartel arrangements. First, these arrangements represented collusive price fixing action by producers alone without consumer participation. This control of the markets for copper by the collusive actions of producers alone ran contrary to the free trade principles, and therefore invited much criticism from the "free market" oriented

8. For a detailed explanation of the various price control mechanisms used in early cartel agreements, see United Nations Department of Economic Affairs, "International Cartels," 24 UN Publ. Sales No. 1948.II.D.2 (1947) at p.7.

countries. Such criticisms were later translated into antitrust laws, discussed on the next page and which restrict or prohibit the use of cartel agreements.[9]

The second basic feature of the inter-war cartel agreements in copper was the fact that they involved private producer enterprises as opposed to governmental or public controlled enterprises. This reflected the prevailing philosophy of the time which advocated for minimum governmental control in trade matters. The inter-war period was the era of the private enterprise and cartel agreements were merely a reflection of the power of private enterprise in the marketing of the commodities it produced. The problem with such cartel arrangements however, was that more often than not the interests of the private producers in the cartel were carried too far and resulted in the restriction of trade. The possibility of the self interest of the cartel members working to restrict trade in the particular commodity constituted another reason for the development of antitrust laws in various countries.

The third feature relates to the methods employed in the cartel agreements in order to control the markets. The methods used in all the inter-war copper cartels were production and sales control. By their very nature production and sales controls are aimed at providing a temporary solution to the problems of price instability. This

---

9. W. Friedman, "Antitrust Law and Joint international business ventures in economically underdeveloped countries," (1960) 60 <u>Columbia Law Review</u>, 780.

temporary relief came by way of supply adjustment through production cuts or sales restrictions thus creating scarcity which in turn temporarily raised the prices of the commodity. Other than such a temporary relief, the cartel agreements did not attempt to tackle the problem of market instability on a permanent basis. This piecemeal approach did on many occasions cause disagreements among the members of the cartels themselves and contributed to the short lives of the inter-war copper cartel agreements.

As a reaction to cartel arrangements generally, many governments sought to introduce domestic measures which would restrict the use of cartel arrangements to control commodity markets. The measures advanced were in the form of antitrust laws which sought to control collusive market action through domestic legislation. These antitrust laws have in a number of ways influenced the development of international legal controls on the commodity markets. It is for this reason that a short disucssion of antitrust laws will be made here.

V. Antitrust Laws

There are two broad approaches to antitrust laws. The first approach relates to a complete abolition of private international marketing schemes by private entrepreneuers by municipal action comparable to that envisaged by the Sherman Act in the United States.[10] The second approach is represented by various examples of antitrust legislation found

10. The Sherman Act. 26 Stat. 209 (1890) as amended, 15 U.S.C.A.

in major western European countries. These laws generally speaking provide for tolerance of cooperation between private producer entrepreneurs but providing for certain public regulation of such arrangements.

The basic philosophy behind antitrust legislation seems to be to assure that the market will remain competitive. The logic behind the legal premise underlying market ordering itself suggests some regulation of the market to curb anti-competitive practices. It is self evident in market theory that private entrepreneurs seek to maximize their profit motives. This profit maximization may be achieved within the rules of the competitive market or in ways destructive of market ordering, for example, through coercive and dominant market power, or through collusive action with others. Furthermore, there is an important legal postulate underlying market theory, that of maximum freedom of contract. This freedom however can be abused through collusive agreements such as cartels which destroy basic aspects of market ordering. The issue therefore is whether private entrepreneurs in exercising profit maximization and freedom of contract do operate within the economic and legal principles underlying the market or in violation of them. Self interest of cartel members appears to have operated in ways destructive of market ordering. This restriction of competition required governmental action to protect the market structure. It is only in this sense that antitrust laws may be said to be justified as an attempt to control anticompetitive practices among firms. The philosophical aspects of the antitrust laws were succinctly described by Judge Learned Hand in <u>United States</u>

v. Aluminium Company of America.[11] In considering the government's charge that the defendant had monopolized the domestic market in aluminium ingot in violation of the Sherman Act, Judge Hand stated:

> "... it is no excuse for monopolizing a market that the monopoly has not been used to extract from the consumer more than a "fair" profit. The Act has wider purposes. Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. ..."

In pursuit of these philosophical goals, the United States Congress has over the years developed a network of statutes, of which the basic provisions are contained in sections one and two of the Sherman Act. Section 1 states that,

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal ... Every person who shall make any contract or engage in any combination or conspiracy declared by this (Act) to be illegal shall be deemed guilty of a misdemeanor ..."

Section 2 of the Sherman Act provides that,

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of misdemeanor. ..."

Judicial interpretation of the above two provisions makes it clear that any agreements between United States firms or

---

11. The United States v. Aluminium company of America, 148 F.2d. (Sd. Cir. 1945) 416 at p.427.

between United States firms and foreign firms which aim in one way or the other to control a commodity market or restrict competition on such a market, are prohibited.[12] This means that all cartel arrangements involving an American producing firm would be subject to the Sherman Act and therefore subject to challenge in the American courts.

VI. Antitrust Laws in Europe

Most antitrust legislation in Europe were enacted, after World War II as a result of renewed attention to problems of restoring competition in various domestic markets. In Britain for example, a Restrictive Trade Practices Act was passed in 1956 and legislation relating to monopolies and mergers was passed in 1965. Most of the antitrust laws in European countries have more recently been supplemented by Articles 85 to 90 of the Rome treaty creating the EEC. Generally speaking most European antitrust legislation permit more justification for collusive agreements amongst producers than the United States Sherman Act. The reason for this approach in Europe seems to lie in the economic systems and philosophy that these countries strive to build. Many of these countries believe that restriction of competition may be beneficial in certain circumstances. It is for this reason that these countries provide express or implied exemptions from the normal antitrust rules for certain industries. In certain instances these exemptions go as

12. See for example, Northern Pacific Railway Company v. United States 356 U.S.I. 5, 785. Ct. 514-518, 2L. Ed (1958)

far as suggesting that the antitrust laws tolerate the organization of cartels.[13]

The different approaches taken by the United States and European countries clearly show that antitrust laws are ultimately a product of a particular country's economic policies and philosophy. This being the case, it is difficult to envisage a pattern of antitrust laws that would be applicable to all countries. While countries like the United States might favour laws that restrict collusive market control, developing countries might argue in favour of cooperation among exporters. Thus different economic circumstances and political beliefs may lead to different poliices towards international market organization. Efforts to find a common denominator in international market regulation since the Second World War have therefore centred on intergovernmental commodity agreements.

VII. International Commodity Agreements

The first attempt to bring international commodity trade under international legal control was made in 1947-48 at the Havana Conference where a draft charter for an International Trade Organization (ITO) was to be negotiated. Chapter VI of the draft Havana charter which was finally never adopted, formed the basis of the commodity discussion at the conference. This chapter singled out problems related to commodity marketing and in particular, recognized the fact that the concept

---

13. See H.J. Steiner and D.F. Vagts, Transnational Legal Problems, (1976) New York , pp.997-8.

of freedom of competition was not particularly suitable for application to commodity markets.[14] The chapter was therefore devoted to the establishment of principles and machinery to be used in effecting inter-governmental action. One of the most important measures recommended was the conclusion of International Commodity Agreements. Over the years following the Havana conference, many of the regulatory principles of international commodity markets have been evolved through the use of commodity agreements.

(i) <u>Legal basis for conclusion of commodity agreements</u>

Chapter VI of the draft ITO charter formed the basis for principles obtaining in commodity agreements.[15] The chapter was devoted to the establishment of principles and institutional machinery for effecting intergovernmental action in international commodity markets. Of particular interest in the chapter was a recognition of the serious adverse effects problems of commodity markets might have on both producers and consumers of such commodities.[16] This recognition has come to form one basic principle that requires the participation of both producers and consumers in the conclusion of any commodity agreement.

Although the ITO charter never came into force due to lack of ratification, its ideals, principles and institutional arrangements applicable to commodity agreements managed to

---

14. Article 55 of the draft ITO charter. For an official text see S.D. Metzger, <u>Law of international trade - Documents and readings</u>, vol. 2 (1966), p.1166.

15. United Nations Document No. E/Conf.2/78 UN Pub. Sales No. 1948.II.D.4.

16. <u>Ibid</u>., note 15.

survive. The adoption of the Havana principles was made possible by a number of the United Nations Economic and Social Council (ECOSOC) resolutions which called for the use of the ITO principles in all future commodity agreements as a general guide to all future intergovernmental action in matters of international commodity trade.[17] Since the powers of ECOSOC have their own limitations in the sense that its actions are not binding upon members of the United Nations, its resolution regarding commodity agreements was made by way of a recommendation to member countries. This recommendation has formed the basis upon which the Havana principles have been applied in the few commodity agreements that have been concluded in the 1960s and 1970s. There are three important sets of principles that formed the basis of chapter VI of the Havana charter. These were the procedural principles for the conclusion of commodity agreements, principles relating to institutional arrangements, and principles relating to the market control mechanisms to be employed. These principles will briefly be discussed here.

(ii) Procedural arrangements

The most important procedural principle relates to the process of creating a commodity agreement. The issues that would trigger the process of creating a commodity agreement have been based on the "findings" required under Article 62 of the ITO charter. The requisite "findings" under this

---

17. United Nations Economic and Social Council, resolution 30(iv) of March 28, 1947.
Also United Nations General Assembly resolution 623, 7 UN 6 AOR Suppl. 20 p.15.

Article were to be either a burdensome surplus of the commodity, undue hardship to small producers, and price inelasticity or widespread unemployment, undue hardship to workers and inelasticity of prices.

After this prerequisite finding had been made, the ITO charter set out two basic procedural principles for the conclusion and operation of commodity agreements which have been strictly adhered to in negotiating commodity agreements. The first principle required that participation in all commodity agreements be open to those countries "substantially interested" in the particular commodity forming the subject of the agreement. The term "substantially interested" has generally come to be understood to include both producers and consumers of the commodity in question.[18]

The second important principle related to the voting power in these agreements. In this regard it was required that countries with interest in the import of the commodity in question, should have voting power on substantive matters equal to those countries interested in exports. This latter principle has been considered to be a vast improvement over pre-war private cartels in which consumers were generally excluded from the decision making process. The basic premise underlying the two principles is producer and consumer cooperation in international commodity market control. The notion of consumer-producer cooperation has however, had its own shortcomings. First, because basic agreement

---

18. Articles 60 and 63 of the draft ITO charter.

has to be reached between producers and consumers before a commodity agreement can be entered into, it has been difficult for producers and consumers in a number of commodities to conclude agreements.[19] The basic problem in reaching agreement between producers and consumers as to the need for a commodity agreement lies in the conflict of interest that usually characterizes producers and consumers. Second, even where the need for consumer-producer cooperation has been recognized and a commodity agreement has been concluded, the successful operation of such an agreement continues to depend on continued cooperation between the two sides. The lack of acknowledged common interest between exporters and importers during the duration of the agreement is bound to destroy the essence of the agreement.

The significance of cooperation between producers and consumers lies in the fact that without this cooperation no commodity agreement can be concluded. For example, in the case of copper, although it was recognized in certain quarters that copper market stabilization was necessary as early as the 1960s, it was not until 1976 that active negotiations for a commodity agreement in copper began.[20] This delay can only be explained in terms of conflicting interests between producers and consumers. Consuming nations in general suspect that an international agreement in copper would be used in the long run to raise the prices of the metal above the long-run equilibrium. This fear by consuming countries is not entirely without foundation

19. Only five commodity agreements have operated to date. These are agreements for tin, cocoa, coffee, sugar and wheat.

20. "Face to face", CIPEC Quarterly Review, Jan.-Mar.1976, pp. 7-8.

because producing countries generally are inclined to seek higher prices for their commodities. Consuming countries are also under pressure from various interest groups not to favour commodity agreements because the introduction of a regulatory institution does challenge their independence. Rio Tinto Zinc, the giant mining multinational has invoked this argument against the establishment of an international copper agreement.[21] It is for this reason that until there was official backing to the idea of a copper commodity agreement between Zaire on the producing side and France on the consuming side, that active participation of the United Nations Conference for Trade and Development (UNCTAD) was obtained and negotiations began.

(iii) Market control mechanisms

To a degree, the main aim of commodity agreements is to introduce regulatory measures that bypass the principles of freedom of competition in international commodity markets. The degree of planning introduced for this purpose would vary from commodity to commodity although in each case they would aim at preventing excessive short-term price fluctuations of individual commodities.

In general there are three market control mechanisms envisaged by chapter VI of the Havana charter. These are controls on production, quantitative controls on exports and imports, and controls on price levels. Chapter VI

---

21. See Paul Hallwood, Stabilization of international commodity markets, (1979) Jai Press Inc, Connecticut.

however, did not include specific provisions that clarified what control method was to be used for what commodity. Because of this lack of specificity, the control methods to be adopted were left to be decided on a commodity by commodity basis and chapter six merely provided the guiding principles. As a result of this commodity by commodity approach in deciding the control mechanism to be used, a number of control devices emerged. It is possible to identify at least four commodity market control devices within the framework of the Havana Charter. These are the export quota mechanism, the buffer stock mechanism, the import and export control mechanism, and the multilateral contract mechanism.

(a) The export quota mechanism

The main aim of an export quota mechanism is to control a commodity market by preventing surpluses of a commodity reaching it. A commodity agreement utilizing this mechanism provides for specified quotas assigned to each participating country.[22] The quota assigned to each country represents that country's share of the projected free market requirement of the commodity.[23] To attain the objective of price stabilization the export quota mechanism operates by way of adjusting the various quotas assigned to member countries by either increasing or decreasing them when market conditions so desire, thereby maintaining the prices in a desired range. A good example in this

22. For example, the 1958 Sugar Agreements Article 14.
23. Ibid., Articles 14 and 18.

regard was the 1958 Sugar agreement which had as its main objective to maintain world sugar prices within the range of 3.15 to 4 cents per pound.[24] This goal was to be achieved by either increasing or decreasing the various quotas assigned to members, when the prices threatened to go below or above the range.

The effectiveness of this control mechanism in commodity price stabilization, depends to a large extent on the measures the commodity agreement itself provides to control two inherent problems. First, an agreement employing an export quota mechanism has to contend with those members that fail to adhere to their quota allocations. Failure to adhere to the allocated quotas may lead to some participating producers exporting far more than their respective quotas. In such a situation, the very objective sought by the mechanism would be defeated. It is therefore, of crucial importance that an agreement of this nature provides for measures that would ensure that exporting countires stayed within their export quota limits. The 1958 Sugar Agreement for example, did provide for such measures.[25] The second problem that has to be tackled by a commodity agreement that utilizes this mechanism relates to non-participating exporting countries. Such countries, operating outside the framework of the agreement may take advantage of the supply cuts created by the members quota allocations, by increasing their exports. If such a situation happened, then excess supplies would be

24. Ibid., Article 21.
25. Ibid., Article 8(1).

available on the market and the prices would be suppressed defeating the very purpose of the export quota agreement. This problem can be tackled by the agreement encompassing as many exporting and importing countries as possible. Failure to this, the agreement could make provisions requiring participating consuming nations not to increase their purchases of the commodity from the non-participating countries beyond a specified amount.[26]

(b) The buffer stock mechanism

An agreement utilizing the buffer stock, makes provision for the creation of an authority that is charged with the responsibility of maintaining the prices of the commodity in question within a specified and agreed range. The Sixth tin agreement for example, utilizes this mechanism and provides for a floor and ceiling prices which the buffer stock has to maintain.[27] The buffer stock authority maintains the agreed range by way of making purchases of the commodity from the market when the market prices drop to an agreed level, and selling into the market when prices rise beyond the agreed ceiling. A smooth operation of this process would help stabilize a commodity's prices to a desired range.

The difficulty that usually fails an agreement which seeks to utilize this agreement relates to the financing of the buffer stock. A buffer stock authority requires substantial funds to be able to effectively control a commodity market. By the very nature of commodity agreements, it would appear that the responsibility for the financing of a buffer

---

26. Ibid., Articles 7(i) and (ii).
27. Ibid., Article 27(i).

stock, first and foremost lies on the members of the agreement. Unfortunately, importing countries are usually reluctant to contribute towards the financing of the buffer stock. This reluctance has its roots in an ideological stance held by the developed consuming nations against market control, an issue that for a long time dominated the United States and West German governmental attitudes to international commodity agreements. Another contributing factor to these countries' reluctance to finance buffer stocks, is the assumption they hold that the exporter developing countries stand to gain more than consumer developed countries as a result of successful operation of commodity agreements. Since the developing exporter countries stand to gain more, they should bear a heavier financial burden as far as the operation of commodity agreements is concerned. However, since developing countries have financial problems of their own, buffer stock financing provisions have been inadequate in a number of cases thereby contributing to the failure of some agreements to meet their price stabilization goal.[28]

A marked reluctance to finance buffer stocks by developed consuming countries is exemplified by the fifth international tin agreement.[29] Under that agreement tin producing members of the agreement, who are mainly developing countries, were required to make substantial contributions to the formation and maintenance of a tin buffer stock.[30] Consumer countries

28. This situation has certainly arisen on a number of occasions in relation to the Tin Agreement, when tin stocks have been exhausted.

29. The fifth Tin Agreement came into force provisionally on 1st July 1976 and definitively on 14th June 1977.

30. Article 20(6)(i) of the Sixth Tin Agreement.

on the other hand were not obliged to make such contributions but could do so by way of voluntary contributions which remained under the control of the donors who could at any time ask for the donations to be refunded.[31] In total, the fifth tin agreement placed the entire financing of the buffer stock in the hands of producer developing countries who are ill equipped, financially, to finance a buffer stock such as that envisaged in the agreement. It is actually against this background of a marked reluctance on the part of the importers to make financial contributions that the key importance of UNCTAD's Commond Fund is brought into focus. The principles and role of the Common Fund will be discussed in a later chapter. However, one point needs to be made here. It seems very likely that the negotiations for a Common Fund in UNCTAD might have had influence on the consuming countries' willingness to contribute towards the tin buffer stock under the 6th tin agreement. Under that agreement the financing of the buffer stock is required to be shared equally between producing and consuming members.[32] This agreement appears to have made a great step by actually committing developed consumer countries to an equal share of the financing of the buffer stock. It should be noted that during the entire duration of the 4th agreement only two consumer countries, that is France and the Netherlands had made voluntary contributions.

31. Ibid., Article 22.

32. Ibid., Article 22(1).

In the 5th agreement the two consumer countries were joined by Belgium, United Kingdom, Japan, Norway, Canada, and the United States.[33] This represents only about a quarter of the total consuming members of the tin agreement.[34]

On a second level, the problem that arises out of the use of a buffer stock mechanism relates to the price range that is to be maintained by the buffer stock. Producing countries, members of a commodity agreement utilizing the buffer stock mechanism usually prefer a high floor and ceiling price or even no ceiling price at all, while the consuming countries take an almost opposite view. Despite this conflict of interest, the floor and ceiling prices are not fixed arbitrarily. For example, in the Tin Agreements the floor and ceiling prices are arrived at by a Council majority decision in which consuming countries and producing countries have 50% of the total votes each. In the Sixth Tin Agreement, the Council is required to take into consideration a number of issues when determining the floor and ceiling prices. The factors to be taken into account include trends in tin production and consumption, production costs, and the adequacy of current prices to maintain sufficient future mine production. The problem however, is that these factors are bound to be looked at

---

33. The International Tin Council, Annual Report for 1979-80 at p.24.

34. The number of consumer countries in both the fourth and fifth tin agreements was 23.

from different angles by producing countries on the one hand, and consuming countries on the other. The result of this conflict of interest might be the creation of artificial floor and ceiling prices that did not adequately represent an unbiased view of the trends in the market. This certainly appears to have been the problem in the fifth tin agreement when the ceiling and floor prices were adjusted no less than three times. The first revision was made in July of 1978 when the floor price was fixed at 1,350 Malaysian dollars per pikul and the ceiling price 1,700 Malaysian dollars per pikul. A year later, in July 1979 the floor price was adjusted to 1,500 Malaysian dollars per pikul and the ceiling 1,950 Malaysian dollars. In March 1980 the floor price was increased to 1,650 and the ceiling price to 2,145 Malaysian dollars per pikul.[35] In the final analysis, therefore, the agreed floor and ceiling prices were more a result of compromise and perhaps coercion which is to be expected at international conferences than anything else.

(c) The import and export control mechanism

This price control mechanism has been utilized in the four coffee agreements that have operated since 1963. The mechanism operates on the basis of estimated world imports. The estimated figure is then apportioned among exporting countries as their basic export quotas.[36] To maintain a desired level of prices the allocated quotas would be increased or decreased depending on the desired goal.

---

35. See the International Tin Council, Annual Report for 1979-80, pp. 24-26.

36. See for example, Articles 29 and 30 of the 1976 Coffee agreement.
See also articles 29 and 30 of the 1983 Coffee agreement.

The obvious difficulty with this mechanism relates to making sure that no exporting member exports more than its allocated quota. This problem became glaringly obvious in the first two coffee agreements when exporters exceeded their quotas and sold coffee secretly in violation of legal provisions of the international agreement. Effective monitoring of adherence to the allocated quotas by producing member countries appears to depend on cooperation by consuming countries. Thus for example, the policing procedures employed by the 1976 and 1983 International Coffee agreements require "a certificate of origin" and "certificate of re-export" to accompany all shipments of coffee from member countries.[37] The purpose of these certificates is to establish the origin of the coffee produced or processed so that the Coffee Council could be able to check compliance with the allocated quotas. The consuming member countries are charged with the responsibility of policing compliance by refusing to purchase coffee not accompanied by valid certificates. Penalties are provided for both exporters who exceed their quota allocations and consuming countries that exceed import limits from non member countries. These penalties may ultimately mean suspension of voting rights for the member concerned.[38] But since no other penalties are provided for either importing or exporting members who violate other rules of the International Coffee Agreement the system is likely to be abused through the forging of certificates of origin.

---

37. Ibid., Article 43.

38. Articles 42 and 45 of the 1983 Coffee agreement.

The second problem that is likely to occur under a commodity agreement utilizing an export and import control mechanism is that which relates to a build up of the commodity in the producing countries. Since export quotas would vary from year to year, the likelihood of producer countries finding themselves with excess quantities of the commodity far beyond their quotas is a real possibility. This is so because of the difficulty of adjusting production at the same rate as changes in market demand. A possible solution to this problem may lie in the incorporation of production provisions into the commodity agreement, so that the Commodity Council could order adjustment of production taking into consideration projected market conditions of demand. This agreement would, if well policed, avoid the dangers of excessive production that would leave producers with large stocks. But as the experience of the first two international coffee agreements revealed enforcement of such production targets is a difficult issue. Countries that depended heavily on coffee exports for their foreign earnings were always tempted to increase production so as to take advantage of price increases on the market. Because of this kind of difficulty, the procedures aimed at establishing long-term production goals in the first two coffee agreements were abandoned in the 1976 and 1983 agreements, because they had proved, by and large, to be ineffective. Since the latest coffee agreement does not have provisions aimed at control of production, the imposition of export quotas may eventually lead to an unplanned build up of national coffee stocks which in turn would tend to have a price depressing effect on the international markets.

(d) The Multilateral Control Mechanism

The final mechanism employed in international commodity agreements in an effort to stabilize prices, is the multilateral contract. This control mechanism represents an agreement by which importing countries agree to purchase a specified percentage of their total commercial imports of a commodity from participating exporting countries within a set price range. Exporting member countries on the other hand would undertake to make available to importing countries a sufficient quantity of the commodity at an agreed price.

The only commodity agreement to have utilized this mechanism is the international Wheat Agreement, which is of little significance to developing countries since it involves mainly developed wheat producing and consuming countries. It is difficult to envisage the use of this mechanism for any other commodity particularly because most commodities are produced by developing countries and consumed by developed countries. This situation and the resulting conflict between the two sides makes it unlikely that agreement would be reached where such a mechanism would be used. It is perhaps due to a recognition of this fact that the Integrated Programme for Commodities devised by UNCTAD does not recommend the use of this mechanism in commodity negotiations. For this reason the mechanism will not be discussed further.

(iv) Financial Provisions in Commodity agreements

One of the most important aspects of any commodity agreement is the question of financing the operation of the agreement. Obviously the nature of the financial provisions will vary with the nature of the commodity and the control mechanism to be used. In the commodity agreements that have operated so far, there have been two types of financial provisions. First there have been the provisions dealing with financing of the general administration of the agreement, and secondly those provisions providing for the financing of buffer stocks.

The first type of provisions have been utilized in varying forms in all commodity agreements that have operated to date. All these agreements have made the rate of contribution towards the administration of the agreement dependent on the voting power of each member in the agreement. Thus for example, the 1976 Coffee agreement requires contributions to be made by both producers and consumers in accordance with each member's voting power.[39] Since both the 1976 and 1983 Coffee agreements provide for an equal distribution of votes between producer countries on the one hand and consumer countries on the other, the contributions made by the two groups must be equal.[40] The same arrangement applies in the case of the Cocoa and the tin agreements.[41]

These financial provisions do not present a particularly serious problem because there seems to be a general consensus that any international institutional arrangement has to meet its expenses from member contributions.[42]

Difficult problems do arise however, in relation to

---

39. Ibid., articles 25(2).
40. Ibid., article 13.
41. See Article 23(2) of the 1980 International Cocoa Agreement as well as article 20(2) of the six Tin Agreement
42. Certain Expenses of the United Nations, [1962] ICJ Reports, 6

financial provisions aimed at raising funds for financing buffer stock arrangements. Two agreements that make use of the buffer stock mechanism are the International Tin Agreement (ITA) and the International Cocoa Agreement (ICCA).[43] The major problems that have been encountered in these two agreements is for the parties to agree on the size of the buffer stock. The consuming countries generally advance the view that a large buffer stock would be expensive to maintain and because the beliefs that such a buffer stock would ultimately be to the advantage of developing countries, they do not want to agree to a large scale buffer stock. This line of thinking appears to have contributed to the slow progress in the negotations for an International Copper Agreement. The sixth preparatory meeting for an international agreement on copper appointed a second intergovernmental group of experts. This group was to examine the best control mechanism that could be employed in an International Copper Agreement and the costs and benefits of such an arrangement to both producers and consumers.[44] It was to examine, in particular, such questions as the size of the buffer stock, the price range, and financial requirements. In the end the consumers on the one hand and producers on the other failed to agree on the size of the stocks and price ranges.[45]

Adequate financial provisions for a future copper

---

43. Article 35, 1980 Cocoa Agreement which entered into force provisionally on 1st August 1981. Also Articles 22-24 of the Sixth Tin Agreement.

44. See UNCTAD Document TD/B/IPC/Copper/16.

45. <u>CIPEC Quarterly Review</u>, April-June (1979), p.7.

commodity agreement will therefore depend on two things. First, it will depend on the recognition by both consumers and producers that a commodity agreement is ultimately beneficial to both of them, and secondly, on the successful operation of the Common fund under the integrated programme for commodities.

(v) Constitutional provisions

(a) Membership and distribution of votes

By their very nature commodity agreements are required to consist of both producing and exporting countries. In fact the successful operation of any commodity agreement depends on the cooperation existing between producer countries and consumer countries. All existing commodity agreements have membership open to all producing and consuming nations substantially interested in the particular commodities.[46] This is in accordance with the principles enunciated under chapter VI of the draft Havana charter.

Since the interests of both producer countries and consumer countries have to be taken into account in any commodity agreement, the question of distribution of votes between the two groups becomes of critical importance particularly when one realizes that in most cases consumers of a commodity will surpass the number of producers. This situation has existed in respect of all the commodity agreements that have operated to date except for that of coffee where you have 42 exporting countries as compared to 21 importing members.[47] In the case of the 6th tin agreement,

46. See for example, Articles 3(6) and (7) of the coffee agreement (1983).

47. Annex 2, Coffee agreement 1976.

the producing member countries number seven while importing countries number 23.[48] Again in the case of the 1980 Cocoa agreement which entered into force on 1st August 1981, its membership constituted 15 exporting countries and 20 importing countries.[49] The draft Havana charter must have anticipated this disparity between the numbers of producers and consumers. To keep the balance between the two sides, the draft charter required each commodity agreement to provide for an equal distribution of votes between the two groups. In fact all commodity agreements that have existed to date have adhered to this requirement and have provided for equal votes for producer countries on the one hand, and consumer countries on the other. For example, the tin, cocoa and coffee agreements all assign 1,000 votes to producer countries and another 1,000 to consuming countries.[50] The significance of this vote distribution appears to lie in the fact that it guarantees equal representation of the interests of the two principal parties to any commodity agreement - the consumers and producers.

The distribution of votes between the members of each principal group, has in all the agreements been based on the importance of each member country as producer or consumer of the commodity. The proportional percentage of a country's exports or imports in relation to total world exports and

---

48. International Tin Council, Annual Report (1979-1980), pp. 5-6.

49. International Cocoa Council, Annual Report (1980-1981), p.10.

50. Article 14 paras 1 and 2 of the 6th tin agreement, and Article 10 para 1 of the Cocoa agreement (1980).

imports is used as a basis for the distribution of votes in all commodity agreements. In the International Tin Agreement, each producing country is initially allocated 5 votes out of the 1,000 votes for the group. The remaining votes are then divided as closely as possible in proportion to individual percentages of production.[51] The same vote distribution applies in the case of consumer countries who receive five initial votes each and share the remaining votes in proportion to their percentage of consumption of the commodity. The Coffee agreement also follows this pattern of vote distribution.

The importance of proportional vote distribution in each of the two parties in a commodity agreement appears to be that it provides proportional representation of the interests of both consumers and producers. The basic assumption here being that the interests of parties to a commodity agreement are best determined by the percentage of the community of producers or consumers. But this assumption does not necessarily reflect the realities of the situation. Certain producers for example, might produce a high percentage of a particular commodity which is regulated by a commodity agreement. Under normal circumstances such a producer would be allocated a greater percentage of votes compared to the smaller producers. This would mean greater power, for such a producer although the commodity which is

51. Article 14(1), Sixth tin agreement.

a subject of agreement might only play a very small role in the overall economy of that producer. The opposite might be said in the case of a small producer who is therefore allocated few votes but the affairs of the commodity agreement are of critical importance to it because its economy depends almost entirely on the commoidty in question. However, since a commodity agreement concerns itself with stabilizing the markets of one particular commodity, the issue of the significance of the commodity to the economy of a particular member country would appear to overstretch the essence of a commodity agreement.

(vi) Organizational structure and decision making

(a) Commodity Council

The organizational structure of any commodity agreement is characterised by one main policy making organ, the commodity Council. All commodity agreements that have operated so far have provided for the creation of commodity Councils as the main policy making organs responsible for the running of the agreements.[52]

The composition of these Councils reflects the nature of the functions assigned to them. All the commodity councils that exist today are composed of representatives of all participating countries in the agreements.[53] Such a composition means inevitably that the commodity Councils are very large in size and cannot be permanently based at

52. See for example, Article 6(1) of the Cocoa Agreement, Article 7 of the 6th Tin Agreement, and Article 9(1) of the Coffee agreement of 1983.

53. Article 4(a), Sixth Tin Agreement, Article 9 of the 1983 Coffee Agreement, and the 1981 Cocoa Agreement's article 6.

the headquarters of the commodity agreements. Since it is necessary for certain decisions to be taken at short notice, the commodity agreements have made provision for commodity Councils to delegate some of their powers or functions to smaller organs. The nature of these subsidiary organs varies from one agreement to the other. The 1980 Cocoa agreement for example, provides for two subsidiary organs to which some of the Cocoa Council's functions are delegated. These two organs are the Executive Committee and the Executive Director.[54] The tin agreement establishes a number of subsidiary bodies in the form of committees, each being delegated with certain specialized aspects of the tin Council's functions. This agreement establishes, the economic and price review panel, the administrative committee, the buffer stock finance committee, committee on costs and prices, committee on development, credentials committee, and a statistical committee.[55] The coffee agreement on the other hand provides for the creation of an executive board, and the executive director.[56]

The small nature of the subsidiary organs of a commodity Council means few members of an agreement can be represented on any one such organ. Thus for example in the case of the tin agreement only 17 out of the total membership of 30 are members of the buffer finance committee. Twelve members are represented on the administrative committee.[57] Because of the

---

54. Article 5 of the Cocoa agreement.
55. Article 9, Sixth tin agreement.
56. Article 8(3), 1983 Coffee agreement.
57. Tin Council <u>Annual report</u> 1979-1980.

nature of representation on these subsidiary organs, it is necessary for a commodity agreement to safeguard the interests of the unrepresented members of the agreement. To do this, all existing commodity agreements either restrict the functions that can be delegated or require a strict special vote before a subsidiary organ can be formed and given certain functions.

Both the coffee and Cocoa agreements provide a list of functions that cannot be delegated to any other organ and are required to be undertaken by the respective Commodity Councils. The functions that cannot be delegated by the Council include: suspension of a member's voting rights; approval of the budget and assessment of contributions; amendments or renegotiations or termination of the agreement;[58] redistribution of votes; revision of floor and ceiling prices; decision of disputes; and exclusion of a member from the agreement.[59]

Where delegation of a function has not been specifically prohibited by an agreement, there are stringent voting measures required before such delegation can be made. Thus in the Tin agreement any power which the Tin Council can exercise by a simple distributed majority (that is a simple majority of consumers and producers voting separately) can be delegate to a subsidiary body provided that a two-thirds distributed majority (two-thirds majority of consumers and producers voting separately) is obtained.[60] Since all

58. Article 18(2), 1983 Coffee agreement.
59. Article 17(3) of the Cocoa agreement.
60. Article 8(c)(i), 6th tin agreement.

important issues require two-thirds distributed majority, it is clear that the issue of delegation of the Council's functions in the tin agreement is regarded as an important issue that requires a special vote. It does not therefore matter whether the issue to be delegated is regarded as of minor importance as to require only a simple distributed majority.

In the Cocoa agreement however, distinction is made between minor and important issues. Minor issues being delegated to a subsidiary body require a simple majority distributed vote while the important issues require a special vote of two-thirds distributed majority.[61]

The Coffee agreement like the Tin agreement considers the issue of delegation of responsibility by the Coffee council as an important issue that requires on every occasion a special vote of the council, that is, a two-thirds distributed majority.[62]

The restrictions on the powers of delegation in the various commodity agreements merely serve to emphasize the importance and supremacy of the commodity Councils in so far as policy formulation is concerned. Furthermore, the supremacy of the commodity council where all producer and consumers who are members of a commodity agreement meet, serves to distinguish such an agreement from cartels which were interested in safeguarding only the interests of producers.

---

61. Article 17(3), 1980 Cocoa agreement.
62. Article 18(2), 1983 Coffee agreement.

(b) Decision Making

The capacity of members of an intenational commodity agreement to reach decisions on issues that affect them under the agreement is of crucial importance to the smooth running of such an agreement. Voting procedures that tend to inhibit mutual decision making are therefore counter productive and will tend to inhibit the agreement's capacity to effect market control.

One fundamental principle that runs through all commodity agreements, is that the votes for purposes of decision making are distributed equally between consuming and producing member countries. This is aimed at ensuring an equal representation of producers and consumer interests - a factor that serves to distinguish a commodity agreement from the much dreaded cartel arrangements.

In furthering this basic principle, all commodity agreements in existence require all decisions, minor and important, to be reached by a distributed majority of its members. A distributed majority is defined in these agreements to mean a requisite majority of the votes cast by producer and consumer members voting separately.[63] This voting procedure applies to two types of issues. There are the simple and important issues. The minor issues generally speaking require, a simple distributed majority vote. This means that for a decision on a simple or minor issue to be made, a simple majority of both producers and consumers

63. Supra coffee agreement, Article 3 para 9 and 10; Cocoa Article 2(n) and)o); and Tin, Article 2.

voting separately must be obtained. The important decisions on the other hand, require a special vote. In all cases the special vote means a two-thirds distributed majority of producer and consumer countries voting separately. Decisions requiring this special vote include all decisions regarding the control mechanism to be used; suspension and other disciplinary measures to be imposed on a member; delegation of powers to a subordinate body by the Council; and decisions regarding renewal or termination of the agreements themselves. Thus for example, the Coffee agreement requires a two-thirds distributed majority for all decisions regarding the allocation of quotas, suspension or reallocation of such quotas, establishment of price ranges; regulation of imports;[64] measures relating to stocks; and measures related to coordination of production policies.[65]

The important aspect of the decision making process in commodity agreements relates to the balancing of the interests of consumers and those of producers. In both minor and important issues, it is practically not possible for either producers or consumers to pass a decision that is not favoured by the other side. Indeed this point has been advanced in support of the use of commodity agreements. But as will be seen later in the chapter, a rigid application of the principle of consumer-producer equality in commodity agreements has contributed in most cases to a breakdown of agreements and non conclusion of certain agreements.

---

64. Supra, Coffee agreement, Article 28(1).
65. Ibid., Articles 50 and 51.

(vii) Dispute settlement in commodity agreements

The dispute settlement procedures in commodity agreements, follow generally the pattern followed in other international institutions - except that in the case of these agreements no recourse can be had to independent adjudication.

There are two dispute settlement procedures found in commodity agreements. First, some agreements provide for consultations between parties in dispute. In facilitating these consultations, appropriate conciliation procedures would be employed with a view to conciliating the parties concerned. All the three existing commodity agreements of interest to developing countries encourage the use of conciliation procedures before the dispute can move to the next stage. The Coffee and Cocoa agreements require member countries to accord sympathetic consideration and adequate consultation opportunities whenever another member makes a complaint relating to the agreement. To facilitate a smooth conciliation, the members in dispute may request the Executive directors to establish independent conciliation panels.[66] This of course does not preclude such members from using other conciliatory means or good offices. The tin agreement emphasizes this point by leaving the question of conciliation outside the framework of the agreement and merely provides mechanism for handling such disputes as are not settled by conciliation or negotiation.[67]

---

66. Ibid., Article 57.
67. Tin agreement, Article 49.

Where conciliation has failed, responsibility for settling the dispute falls on the supreme organs of these agreements - the various commodity councils. The basis of the Council's jurisdiction rests on the matter being referred to it by either party to the dispute.[68] In this regard unlike the international Court of Justice,[69] commodity councils do not have compulsory jurisdiction over disputes between its members. Jurisdiction can only be invoked at a specific request of one of the parties to the dispute.

A dispute that has properly been referred to a commodity Council follows a procedure that seems to be peculiar to commodity agreements. The Council would discuss the matter, and may seek the advice of an advisory panel composed of four members two of whom are nominated by producer members, and the other two nominated by importing members. The four members are unanimously required to select a fifth person to act as chairman of the panel. If the four members fail to agree on the chairman, he would be appointed by the chairman of the commodity council. The four members of the panel, that is excluding the chairman are required to be men of experience in the matter at dispute or having considerable legal experience.[70] The opinion of the panel is submitted to the

---

68. Supra, Coffee agreement Article 58(1); Cocoa, Article 58(1); and Tin, Article 49.

69. See the International Court of Justice Statute, Article 36(1).

70. Supra, Coffee agreement, Article 58(3); Cocoa, Article 58(3), and tin agreement Article 49(3).

Council that finally makes a decision on the dispute after considering all the relevant information.

There are a few points worth noting about the dispute settlement procedures in commodity agreements. First, although the panel established to deal with a dispute is composed very much in the same way as ordinary international arbitration tribunals, its authority does not go beyond that of an advisory nature. Secondly, in the whole process, emphasis is placed on the balancing of the interests of both consumers and producers. This is evident in the requirement of the two panel members to be appointed by each group and the chairman to be appointed by them jointly. Furthermore, the requirement that the final decision must be made by the council, is designed to portray a semblance of impartiality because the votes in the council are divided equally between the two groups. Finally, the decision reached in the Council regarding a dispute and liability for a member's breach of its obligations under the agreements requires a distributed simple majority vote of the members. Here again the idea of balancing the interests of producers and consumers seems to dominate the dispute settlement process.

VIII. Evaluation of the commodity agreement mechanism

Efforts at commodity market management through the medium of commodity agreements have been characterized by progressively greater recognition of combined consumer and producer interests. These features are clearly obvious from the declared objectives of these agreements.[71] Among the declared intentions of existing commodity agreements is the prevention of excessive fluctuations in commodity prices which affect adversely both producers and consumers; to achieve a reasonable balance between world supply and demand of a commodity while at the same time assuring consumers of fair prices and producers, a renumerative price; to assure the consumers of adequate supplies at a reasonable price; and to facilitate an increase in the export earnings of producing member countries, particularly developing ones.

All the objectives above are aimed at striking a balance between the interests of the producer and consumer countries. In fact the problems that have contributed to the conclusion of only a few commodity agreements and the failure of others seem to be a product of this delicate balance.

(a) The first major problem that has confronted commodity agrements relates to the objective of increasing the export earnings of exporting developing countries. This declared objective has been expressed in different forms. Some agreements have called for "fair and equitable prices" and others for "renumerative prices" to producers.[72] Such phrases however well intentioned have come to mean different things to producers and consumers. The consumer nations generally have expressed the fear that such phrases would

71. ECOSOC Resolution 30)iv) of 28th March 1974 as well as the objectives of the tin, Coffee, and Cocoa agreements.

72. <u>Supra</u>, Coffee agreement, Article 1, and Cocoa agreement Article 1(d).

lead to commodity agreements being used to raise prices. The producers on the other hand express the view that such terminology would result in them earning what is rightly due to them. This conflict of interest forms the core of the commodity agreement issue.

Once an agreement has been established, this conflict of interest transforms itself into a more concrete problem, that of determining the width of the intervention price band. Exporters whose interest is in higher commodity prices, usually prefer a high floor and ceiling price or even no ceiling at all. Importers on the other hand, are interested in a steady supply of the commodity at a low price and will therefore take an almost opposite view to that taken by exporters.

(b) The second problem encountered by commodity agreements are pressure groups that exert influence on consumer countries. These pressure groups believe that the introduction of regulatory controls such as commodity agreements, is a challenge to their independence in the markets. These pressure groups include consumers of intermediate products such as the American and West German tin plate producers who worked hard to influence consumers to block the introduction of the International Tin Agreement.[73] In the case of copper, the mining company Rio Tinto Zinc (RTZ) have invoked this arguement against the establishment of an International Copper Agreement.[74]

73. W. Fox, Tin: The Working of a commodity agreement, (1974) Mining Journal Books, London, pp.260-61.

74. HMSO, Report of the House of Lords Select Committee on Commodity prices, (1977) p.532.

(c) The third reason that has led to the failure or non conclusion of commodity agreements is a by-product of the two problems stated above. The lack of a declared common interest between producers and consumers, and the pressure exerted by interest groups on consumer nations transform themselves into a battle over the financing of commodity agreements. In commodity agreement negotiations, there is a marked reluctance by importer nations to contribute towards the financing of such agreements. The reluctance is not only born of the fear that such agreements would be used by producers to raise prices but is also a result of ideological beliefs against interference in the free market mechanism. Indeed this ideological belief dominated the United States and West German governmental attitudes to international commodity agreements until recently.

The reluctance of importers to finance the operation of commodity agreements usually means that the burden falls on exporter nations who are mainly developing countries and ill equipped financially to provide substantial funds for the operation of such agreements. In most cases therefore, financial provisions have been very inadequate and have resulted in the failure of agreements to meet their objectives. For example the Tin Council's buffer stock has repeatedly failed to defend the ceiling price level, while the coffee agreement has not even made provision for a buffer stock.

Recently, the consumer nations have accepted some responsibility in the financing of commodity agreements.

Thus for the first time the responsibility of financing the tin buffer stock under the Sixth tin agreement is placed on both producers and consumers. All earlier agreements required contributions from producers only although consumers could make voluntary contributions if they so wished. This change of attitude however, has not meant adequate funds for commodity agreements because consumers are only willing to commit small amounts of money to these agreements. It is against this background that a lot of interest has been generated in UNCTAD's Commond Fund. Although there may be advantages with the approach taken under the Common Fund arrangement, there is absolutely no guarantee that the question of financing the fund will not encounter the same conservatism on the part of consumer countries as has so far been encountered by individual commodity agreements.

Even if the Common Fund came into operation, the reluctance of consumer countries to commit finances to the problems of commodities and their overriding self interest will continue to hinder the introduction of new commodity agreements and the smooth running of existing ones. The case of copper will be used to illustrate these difficulties.

IX. A Copper Commodity Agreement?

Although efforts to devise institutional controls on international copper markets can be traced back to the 1920s and 1930s, the first major attempt to establish an intergovernmental agreement on copper has been conducted under the UN-Integrated Programme for Commodities. The genesis of these efforts can be traced to the radical change of direction in international economic relations introduced by the United Nations General Assembly at its 6th Special Session in 1974.[75] During this session a programme of action on the establishment of a New International Economic Order (NIEO) was adopted. The main aim of this programme of action as far as our discussion is concerned, is to restructure the distribution of income in favour of developing countries. The declared sphere of action in this regard is the production and marketing of primary commodities. Two years later a very significant policy instrument aimed at achieving the declared NIEO goal was adopted by UNCTAD at its fourth session in Nairobi. This was the integrated programme for commodities (IPC). The most important objective of IPC was stated in the following terms:

> "To achieve stable conditions in commodity trade, including the avoidance of excessive price fluctuations, at levels which would: (a) be remunerative and just to producers and equitable to consumers (b) ... (c) promote equilibrium between supply and demand within expanding world commodity trade."[76]

From this resolution, it is clear that the main concern of the IPC is to provide measures that would help control commodity markets. The measures recommended in the IPC for this purpose include the creation of a common fund for financing of buffer stocks created under various commodity agreements to be negotiated for a selected number of commodities. Copper happens to be one of such commodities.

---

75. General Assembly resolution, 3201 (S-VI).

76. UNCTAD Resolution 93(IV) adopted on 30th May 1976.

The emphasis in the IPC as far as copper is concerned therefore is placed on three issues. First the negotiation of a commodity agreement for copper that would utilize a buffer stock and supply management mechanism. Secondly, the setting up of a Common Fund which a copper commodity Council and other commodity Councils would borrow to finance the stocking measures. And finally the improvement of compensatory financing facilities for the stabilization of export earnings of developing countries. The first issue is particularly important to the discussion in this chapter while the other two will be discussed in later chapters.

The first step required by the IPC is the negotiation of a commodity agreement for copper. Such an agreement when concluded would then obtain its finances for running the copper buffer stock from the proposed Common Fund. This arrangement clearly raises the same problems that commodity agreements negotiated outside the framework of the IPC faced. These problems include the lack of common interest between producers and consumers, pressure from interest groups, and financing of the operation of the buffer stock.

(i) <u>Lack of common interest between producers and consumers</u>

The IPC calls for the creation of a copper commodity agreement to be negotiated between producers and consumers. The first step towards such negotiations began with an initiative taken by the Presidents of France and Zaire in late 1975 when they both declared themselves in favour of convening an international conference on copper. Later that year, the CIPEC ministerial conferences held in Lima, Peru decided to take an active role in seeing that such a conference is convened. Thus with the official backing of one consumer country (France) and one producer country (Zaire), CIPEC requested the Secretary General of UNCTAD to convene an international copper conference.

Since the first preparatory meeting in March 1976, the discussions on the creation of a copper commodity agreement have not led to a consensus between producers and consumers. And by the end of 1982, no substantial headway had been made towards the conclusion of such an agreement. In fact no meeting on copper had taken place since February 1980.[77] One of the major points of disagreement between producers and consumers is the desireability of a copper agreement itself.

There are a number of consumers who do not believe in the beneficial effects of a commodity agreement for copper. Thus for example, at the seventh preparatory meeting on copper held in September 1979 a proposal was made which recognized the merits of the creation of an international commodity agreement. Such an agreement, it was proposed, was to be a full fledged international commodity agreement; having administrative provisions, economic provision; and an established council to administer the agreement.[78] After considerable discussion of these proposals at the Seventh preparatory meeting held in February 1980, major consumers,

---

77. CIPEC Quarterly Review, Jan-March 1982.
78. Ibid., July-September 1979.

including the United States, and Japan thought such a proposal was premature. The majority of the CIPEC countries, the Philippines, the EEC, China, and Russia spoke in favour of the proposal. After further discussion there was a deadlock with one-third of countries favouring the creation of an agreement, one-third against, and the other one-third neutral.[79] The deadlock emphasized the belief of many copper consuming countries that an international commodity agreement in copper will not be able to stabilize copper markets to a reasonable degree, it will be too expensive to run, and the old conservatism that it will go against their free trade principles.

Another problem that was highlighted by this deadlock was the lack of a common interest as between the producers. It is clear that three out of the eight CIPEC members did not favour the creation of an international copper agreement.[80] The lack of a common interest between producers makes the possibility of a commodity agreement in copper very difficult to attain. This is particularly so because producers need a common view before they can strongly negotiate with consumers who in some cases have a declared interest against commodity agreements.

(ii) Pressure from interest groups in consumer countries

The creation of an international commodity agreement to regulate the international copper markets will inevitably have effect on a number of groups in consumer countries.

79. Ibid., January-March 1982, p.11.

80. For example, Australia.

Among the groups that will inevitably feel the effect are multinational mining corporations, intermediary users of copper, and the operators of established commodity markets such as the London Metal Exchange.

Some of these interest groups have shown support for a copper agreement. Such support has been made chiefly by the International Wrought Copper Council (IWCC)[81] which represents the interests of western Europe and Japanese fabricators. This group recognizes that a durable solution to the problems of copper market instability is most likely to be found in efforts conducted at intergovernmental level.

Other interest groups such as the Rio Tinto Zinc (RTZ)[82] mining company believe that an intergovernmental approach to these problems would impede the independence of the copper industry and would invite international political considerations in international copper markets. This position serves to emphasize the fear that mining corporations in the consumer countries have regarding commodity agreements. They regard these agreements as a process of eroding their power over the copper industry - a power that has already been diminished by various nationalization measures in countries where they formally operated. RTZ's opposition to a copper commodity agreement is based on its belief that if a commodity agreement is concluded for copper then the

> "... health of the copper industry would be totally subordinated to international political considerations." 83

---

81. House of Lords, <u>supra</u>, note 78 at p.169.
82. <u>Ibid</u>., p.169
83. <u>Ibid</u>., p.532.

These pressure groups have in many ways influenced the attitude of consumer countries in the negotiations of commodity agreements.

(iii) Lack of common goals and commitment by producers

The nature of commodity agreements is such that in order to be effective a large percentage of producers must participate in the agreement. In other words a large percentage of all production of the commodity must be controlled. This appears to be a first step towards a successful and worthwhile commodity agreement.

As far as copper is concerned, production is not restricted to the developing countries alone. World production of refined copper, in 1973 for example was 8.5 million tons. The principal producers were the United States, USSR, the EEC, Japan, Canada, Chile, Zambia and Zaire. The developing country producers however, show a marked dependence on the export of copper compared to the developed country producers. Thus of the total export earnings of four of the CIPEC countries - Zambia, Zaire, Chile and Papua New Guinea - copper contributes from about 50 to 95 percent. In Peru copper contributes to up 20 per cent of that country's export earnings.

The important feature about the pattern of copper production is that three major producers, the USA, USSR, and Canada fall outside the framework of developing countries. These producers have therefore different views about a copper agreement from those held by developing countries who produce copper. The developed countries generally are opposed to to the creation of commodity agreements which they refer to as charity in disguise.[84]

Among the copper producing developing countries there has also not been a consensus on the need for a copper agreement. this lack of agreement became apparent during the meetings of the expert group on copper. This group consisted of experts nominated by 28 countries - 14 copper exporting and 14 copper importing, as well as CIPEC and the European Economic Community nominated experts. One of the main issues upon which developing countries producing copper showed no agreement related to whether there was need for a commodity agreement or not. Zaire and Chile shared the view held by most developed consumers, that what was needed was a consumer-producer forum. The other two important exporters, Peru and Zambia favoured conclusion of a commodity agreement.[85] In 1978 attempts were made to work out a joint position for producers at a meeting of copper producers held in Paris. This meeting brought together not only CIPEC members but other producers such as Canada, Fin nd, Norway, the Philippines and Poland. This meeting could only agree on the establishment of a "standing intergovernmental consultative copper body" and not a copper agreement. Atlhough CIPEC members were part of this decision, it soon became clear that for these countries the ultimate goal was a copper agreement. At its XIIIth session, the CIPEC conference of Ministers,

---

84. J. Rowe, Primary commodities in international trade (1965), pp.2-3.

85. Ursula Wasermann, "Commodities in UNCTAD: Preliminary meetings on copper", (1977) Journal of World Trade Law, 92, 94-95.

expressed disappointment at the lack of progress in talks towards a copper agreement and reaffirmed its basic objective of working towards an international agreement which would result in renumerative and stabilized prices for copper.

The lack of definitive and concerted approach to the problem of copper price stabilization seems to have been responsible to a great extent for the slow progress in the process of establishing a copper agreement. A commodity agreement for copper will therefore depend to a great extent, on the strengthening of the negotiating position of producer countries. This would be made possible through producers having a common stand on the question of a copper commodity agreement. Strengthening of CIPEC would appear to be one effective way of improving the producers negotiating position.

(iv) Financing of a copper buffer stock

One of the crucial issues in the negotiations for a copper agreement relates to the control mechanism to be incorporated in such an agreement. Among possible measures that have been discussed in this regard are, an international buffer stock scheme, internationally co-ordinated national stocks, export controls, production controls, the exchange of information on production, consumption and stocks, and supply and purchase commitments.[87]

---

86. CIPEC Quarterly Review, April-June 1978 at pp.10-11.

87. See terms of reference of the second intergovernmental group of experts on copper set up by the VIth preparatory meeting for copper. UNCTAD Doc. No. ID/B/IPC/Copper/AC.2/L.7.

A number of studies that have been conducted in relation to copper favour a buffer stock mechanism, used alone or coupled with supply management as the best control mechanism for copper.[88] These studies indicate that buffer stock operations in a copper agreement would effectively reduce copper price fluctuations around the long-term market trend. The producers and consumers of copper agree basically that the best mechanism that should be employed in the case of an agreement being reached is a buffer stock. The source of major concern however, is the cost of operating such a buffer stock and who is to meet such a cost. This is the same old problem that earlier commodity agreements have encountered at one time or another.

The cost of a copper buffer stock appears to be very high according to estimates that have been prepared by experts. Roughly speaking, it is estimated that, for a copper buffer stock to have the desired stabilization effect, about 4 billion United States dollars is required. This is an enormous amount of money especially when one compares it with the tin buffer stock which requires about 0.4 billion US dollars. In view of the enormous amounts of money that might be required for a buffer stock, some consumer countries have advocated a study of other approaches to the solution of copper market problems. In this regard they strongly believe that a smaller buffer stock could achieve the desired stabilization goals if it was coupled with supply management measures. Supply management is not favoured by developing

---

88. CIPEC Quarterly Review, July-September 1979.

countries who depend heavily on copper for their foreign earnings.

Assuming that eventually an agreement would be reached on the size of the buffer stock, the nature of the financing provisions are bound to reflect the unwillingness of consumer countries to finance buffer stocks. Too small a financial commitment by consumers in a copper agreement will make the failure of a copper agreement to stabilize prices more likely. This would be so despite the presence of the IPC's Common Fund from which a copper commodity agreement would be able to draw. The problem with the Common Fund as will be discussed in a later chapter is that it depends on the contributions from member countries as well as the funds available under various commodity agreements. If the available funds from the commodity agreements are inadequate, the Commond Fund will not be able to support the buffer stock requirements of the various commodities and therefore signalling a failure of such agreements.

A successful copper agreement therefore, will require financial provisions that would show more commitment on the consumers to support an adequate buffer stock, that would realistically help to stabilize copper prices. Since commodity agreements are a product of consumer-producer cooperation, the producers will have to be primarily committed to the financing of the buffer stock.

X. Conclusion

The need for intergovernmental regulation of commodity trade was recognized as way back as the first quarter of this century but it was only after the Second World War that the nature and structure of such agreements were outlined. Chapter VI of the Havana charter forms the legal basis for the conclusion of commodity agreements. Although no legal obligation has lain on states to apply these principles, states have uniformly adhered to them ever since. Indeed at present it appears as though states have a duty to apply these principles. The charter of economic rights and duties now describes it as a duty of states to conclude commodity agreements.[89]

The basic pattern followed in all commodity agreements that have been concluded to date has been the same and follows the provisions of the Havana charter closely. All agreements provide for economic provisions aimed at providing a mechanism for the defence and regulation of prices. Secondly, since participation of producers and consumers is important for the effectiveness of agreements, all agreements have membership provisions that make membership open to all "substantially" interested parties. The institutional provisions provide for a general representative body - the Council which exercises express and in some cases implied powers. Unlike many other international organizations, these agreements provide for internalised dispute settlement procedures. Decisions in all commodity agreements are made by way of a distributed weighted voting and participating countries undertake to accept as binding all decisions made within the framework of the agreement.

---

89. See General Assembly resolution 3287(XXIX) of 15th January 1976, article 6.

Copper has only been a subject of discussion as far as a commodity agreement is concerned in the past six years. Until the end of 1982 no substantial progress had been made towards conclusion of a copper agreement. The main stumbling blocks have been lack of commitment by consumers to commit themselves to meeting the cost of financing a buffer stock, the lack of a unified producer stand in the negotiations, the lack of a common interest between producers and consumers. Members of CIPEC have an immense potential bargaining power which if well organised would help accelerate the process of negotiation for a copper agreement. If and when such an agreement is concluded, the pattern established by other agreements such as the tin agreement is most likely to be followed. A copper agreement is most likely to provide for a Council as the main policy making body, weighted voting, internalised dispute settlement procedures, economic provisions committing both producers and consumers to the financing of the activities of the agreement.

The difficulties in the negotiating process however, are very fundamental and stem from the basic difference in opinion between producers and consumers over the desirability of commodity agreements and the form they should take. This fundamental problem has been responsible for non-conclusion of a number of commodity agreements and in the break of some of the few that have been concluded. The copper negotiations are unlikely to resolve this problem because it forms the basic deficiency of a consumer-producer commodity agreement. It is for this reason that a commodity agreement for copper should be regarded as not sufficient to solve copper marketing problems. To solve the problems encountered in the use of the commodity agreement mechanism particularly in relation to the financing of such agreements, an Integrated Programme for Commodities and a Common Fund to finance it has been worked out under the auspices of UNCTAD. Chapter 5 seeks to evaluate the prospects for such a fund in stabilizing copper prices.

CHAPTER FIVE

THE UNITED NATIONS COMMON FUND

I. The Common Fund approach

Copper price stabilization through the medium of a commodity agreement as has been discussed in Chapter IV, has its own problems. One of the major problems that has contributed towards a failure to conclude a copper commodity agreement has been one relating to the financing of a copper buffer stock.

The problems of financing a buffer stock merely reflects one of the basic deficiencies of the whole concept of commodity agreements. Since these agreements bring together producing nations and consuming nations, the differences in the perception of the role of such an agreement is usually tainted by the interests of nations depending on which side they fall, that is whether consumers or producers. It is this fundamental difference which has transformed itself into disagreements over the stabilizing mechanism to be used and how to finance an international commodity agreement for copper.

These problems have been at the core of the difficulties that confronted the few existing commodity agreements that had been entered into under the Havana principles, and the breakdown of negotiations aimed at the conclusion of others.

The Common Fund which was created in 1980 was aimed at filling this void. The approach taken under the Common Fund has been to try and replace what for many years was a commodity by commodity effort at price stabilization with an integrated international policy for price stabilization.

The integrated approach envisaged under the United Nations Integrated Programme for Commodities (IPC) was the creation of agreements for 18 commodities to employ whenever possible, the buffer stock mechanism. Included in the 18 commodities was copper. Such international commodity organizations were then to be related through the Common Fund which would have three functions, that is to finance buffer stocks, to trade on its own account in certain limited circumstances, and to provide loans or grants to aid commodity producing countries in diversifying their economies.

One of the main points behind the creation of a Common Fund therefore, was that the availability of finance in such a fund would remove one of the difficulties that has acted as a constraint in the conclusion of commodity agreements in many commodities. This availability of funds would it was hoped encourage the conclusion of commodity agreements in at least the 18 commodities included in the integrated programme for commodities.

As discussed in Chapter IV, one of the primary objectives in negotiating and establishing any commodity agreement is price stabilization. The Common Fund seeks to enhance this process by making available financial resources to various international commodity organizations so as to enable them to operate buffer stocks and enter markets to purchasers when prices go beyond an agreed maximum.

This chapter examines the Common Fund approach with a view to determining how useful the approach might be in stabilizing copper prices.

II. The place of the Common Fund in the NIEO

The Common Fund must be looked at in the wider context of the New International Economic Order (NIEO) through which the developing countries producers of primary commodities hope to legitimate their case against international economic exploitation by the replacement or restructuring of existing international trade institutions so as to accommodate their legitimate rights and interests.

The NIEO envisaged by these countries must be viewed in terms of three important resolutions of the United Nations General Assembly passed in 1974, that is to say, the declaration on the establishment of NIEO, the programme of action concerning the establishment of NIEO, and the charter of economic rights and duties of states.[1]

The overall objective of the three documents is a restructuring of economic relations between the developed and developing countries based on standards of justice,

---

1. United Nations General Assembly resolutions 320(S-VI), May 1, 1974; resolution 3202 (S-VI) of May 1, 1974; and resolution 3281-XXIX of December 12, 1974.

equality and mutual respect. The present international economic order consists of institutional principles, norms, decision-making procedures, and patterns of behaviour that control among other things trade relations between states. What is called for in the NIEO documents therefore, is the restructuring of these institutions, norms and patterns of behaviour taking into account certain international policy objectives. In this case, "restructuring" cannot be understood as a process aimed at overthrowing of the present order but simply as a process of redefining or reorganizing of the existing order. If this be the case, it is obvious that any restructuring of trade relations must have its starting point in the existing international institutional framework.

The NIEO documents provide a range of possible action for the stabilization of commodity prices. One such action is the conclusion of commodity agreements. These agreements being international treaties,[2] must be regarded as instruments of international law in which as J. Fawcett points out,

> "Law is seen at work both in the creation of such agreements and in the operation of the international organizations they create."[3]

Since 1980, commodity agreements are to be reinforced by an overall integrated programme for commodities with a two pronged structure based on international commodity

---

2. See Article 63 of the Vienna Convention on the Law of treaties.

3. J. Fawcett, "The function of law in international commodity agreements", 44 BYIL, p.157.

organizations and a proposed Common Fund to finance their operations.[4] This overall integrated programme is not in any way a radical overthrawal of the existing institutional principles, norms and patterns of behaviour governing trade in commodities but merely an attempt at restructuring the institutional order.

The question that needs to be answered therefore is how the Common Fund approach seeks to attain this restructuring? There is at least one way in which this restructuring is envisaged in the Common Fund approach. It seeks to create a new institutional structure to act as a financing house for International Commodity Organizations. The creation of the Common Fund as a new institution may be regarded as an attempt to implement NIEO principles.

The Charter of Economic Rights and Duties of States provides in the preamble its main purpose. It states the purpose as,

> "... to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest, and co-operation among all states, irrespective of their economic and social systems."[5]

In seeking to put into practice this principle, the charter provides at least one legal mechanism. Article 10 suggests that solutions to international economic, financial, and monetary problems must be sought within the framework of

---

4. UN Doc. ID/IPC/CONF./19 of March 21, 1979.

5. See Charter of Economic Rights and Duties of States. General Assembly resolution 3281-XXIX of December 12, 1974.

existing

> "... international organizations in accordance with their existing and evolving rules ..."

This phrase would seem to suggest that any application of solutions to problems facing commodity trade must be undertaken within the existing system of international organizations. This of course does not mean that new organizations cannot be created if they conform to the existing international organizational system. If this interpretation is correct, then the creation of the Common Fund as a completely new institutional structure is consistent with the aspirations of the NIEO.

III. The need for a Common Fund as an independent institution

It has been suggested in some literature that the Common Fund as a new institution dealing with international commodity problems such as those affecting Zambian copper was not necessary. It has been argued that provision for such a Fund would have been made at substantially lesser cost within the framework of either the International Monetary Fund or the General Agreement on Tariffs and Trade.[6] Fawcett and Parry for example argue that the proposed Common Fund for commodities has purposes which are consistent with some aspects of the IMF and in particular, article V paragraph 2(b) which states that:

---

6. This argument is for example made in J.E. Fawcett and Audrey Parry, Law and international resource conflicts, (1981), Clarendon Press, Oxford.

> "If requested, the Fund may decide to perform financial and technical services, including the administration of resources contributed by members, that are consistent with the purposes of the Fund. Operations involved in the performance of such financial services should not be on the account of the Fund. Services under this subsection shall not impose any obligation on a member without its consent."

There is no doubt that the proposed Common Fund could be accommodated under this subsection and that the performance by the IMF of these purely administrative and technical duties would have proved a cheaper alternative to the establishment of a completely new institution like the Common Fund. What this argument fails to reveal however, are the inherent and fundamental principle differences behind the two institutions.

As records of the Bretton Woods conference of 1944 upon which the IMF articles of agreement are based show, the primary concern at the time was the creation of an institution designed to deal with currency exchange problems and not commodity problems.[7] The experience of the IMF therefore, leans heavily on monetary matters and has relatively little to do with tackling international commodity problems. These later problems it would appear are best tackled by a specialized institution like the proposed CF.

In addition, the IMF was established at a time when the governing principle of international economic law was that of equality as is exemplified by its weighted voting procedures. This principle has now been transformed into one of solidarity partly because of objections raised by

---

7. U.N. monetary and financial conference, proceedings and documents (1944).

developing countries to the earlier principle. It is difficult to see how these countries would have accepted to entrust the activities of the proposed CF to an institution based on principles to which they take exception.

Furthermore, the policy of the IMF itself does not permit the extension of buffer stocking facilities to the extent envisaged by the Common Fund. The main policies of the IMF regarding use of its resources are determined by article V paragraph 3(a). This provides that:

> "The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special balance of payments policies , that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this agreement, and that will establish adequate safeguards for the temporary use of the general resources of the Fund."

This provision quite clearly excludes the use of the IMF resources for purposes of extending the buffer stock facility to the extent called for in the Common Fund. This apart however, the quoted provision goes to indicate further the fundamental differences between the two institutions and the near impossibility of incorporating the proposed activities of the Common Fund into the International Monetary Fund.

It has also been argued that the proposed Common Fund activities could have been carried out within the framework of the GATT on the lines of chapter VI that is, articles 55 to 70 of the ill fated Havana charter. The proponents of this view argue that if the various provisions of chapter VI of the Havana Charter were to be incorporated in the GATT, it would be possible for the GATT to acquire some measure of control over international commodity organizations in an integrated fashion in the same way the Common Fund is intended to do. It is argued for example that if article 59 of the Havana charter was to be incorporated in the GATT, it would make it possible for the use of intergovernmental commodity conferences to discuss within the framework of GATT,

> "measures designed to meet the special difficulties which exist or are expected to arise concerning a particular primary commodity." [8]

The incorporation of article 64 of the Havana charter into the GATT it is argued will allow the operation of commodity councils within the GATT and would give this organization supervisory powers over commodity organizations in very much the same way as is proposed in the Common Fund.

In theory, these changes can be made to the GATT and would transform this institution in such a way that it can accommodate what is proposed for the Common Fund. In reality however there appears to be a number of difficulties in achieving this change. One of the difficulties stems from the attitude of developing countries to the GATT. There is a wealth of literature which indicates that developing countries have lost faith in the principles upon which this institution is based. One of these principles is that of equality and although there has been a number of mitigating provisions included in the agreement, this

8. Article 59 of the Havana charter.

principle still remains the backbone of the agreement. This principle does not permit a sense of common purpose, interdependence and common interest but rather puts emphasis on the equality of states. Since the ideas behind the creation of the Common Fund are based on the sense of solidarity, it would be difficult to persuade developing countries to entrust their activities to an institution whose foundation is built on other principles.

Furthermore, the GATT lacks that universal acceptance that the Common Fund is likely to enjoy. It should be recalled that many of the countries with planned economies are not members of the GATT basically because the GATT is based on the premise of market economy. The proposed Common Fund on the other hand, does not restrict itself in this way. In fact as stated above, the Fund is based on the principle of solidarity.

In view of all this, it is submitted here that the proposed Common Fund as a new institution to deal with commodity price fluctuations was necessary at least in putting a sense of reality to the ideals of the New International Economic Order. The existing international institutions such as the IMF and the GATT appear to be inadequate or inappropriate to foster this sense of solidarity that the New International Economic Order seeks to realize.

IV. The origins of the Common Fund

The principle of solidarity in the Charter of Economic Rights and Duties of states forms the jurisprudential basis for the Common Fund and indeed the entire United Nations Integrated Programme for Commodities. It should be pointed out at this stage that a number of authors agree that the charter is a legal document of some significant importance and that most of its provisions are a restatement of existing principles of international law while others represent new principles.[9] The new principles it is said, represent or are evidence of the progressive development of international law. The principle of solidarity in the charter is not an entirely new one but is a result of the progressive development of the principle of equality.

The first hint of the possibility of applying this principle to matters of commodity trade was made at the United Nations Conference on Trade and Development held in 1964. The final Act of that conference called for the expansion of the Havana principles governing the conclusion of commodity agreements in order not only to cover individual commodities but groups of commodities.[10] In this respect, the final Act required UNCTAD to create a Commission charged with the responsibility of formulating a scheme for a general and integrated policy for commodities as well as working out a general agreement on commodity matters.[11]

---

10. Address to the working group by its chairman Jorge Castaneda, Mexico's ambassador to the UN in Geneva, Doc. TD/B/AC.12/1 page 4.

11. See proceedings of UNCTAD I, Final Act, second part, 1964.

    Ibid., Annexes A.II.I. pages 26-28.

It was however, not until ten years later in 1974 that UNCTAD proceeded to take action. In that year it passed a resolution calling for

> "... the preparation of an overall integrated programme for commodities."[12]

This was followed by the adoption in August 1974 of the Integrated Programme for Commodities which in its final form called for a concerted approach by all countries in tackling the commodity problem.[13] After years of extensive negotiations, an agreement was reached in 1980 on the form of the integrated programme. What emerged in the final agreement was an integrated programme ;based on international commodity organizations to be voluntarily concluded by both producers and consumers, and supported by a common fund.

The legal significance of this agreement was that in line with the NIEO documents, it created a new institutional structure to deal with commodity problems. This new institution is the Common Fund. This fund was created mainly to co-ordinate the activities of the various international commodity organizations, to give guidance to individual ICOs, as well as acting as a catalyst for the conclusion of more international commodity agreements by providing financial incentives.

Preambular paragraph 1 of the agreement creating the Common Fund, states the determination of member countries to promote economic co-operation based on the principles of

---

12. See UN General Assembly Resolutuion 3203 (s-VI).
13. See UNCTAD Document TD/B/498 of August 1974.

equity and sovereign equality. In many international organizations, the application of these two principles is usually manifested in provision such as those on equal rights of representation and those on equal votes for members.[14] In addition to the two principles above, many international organizations also based their activities on common substantive norms. Examples of such norms are reciprocity, the most-favoured nation clause, the principle of open door, and that of fair treatment. For example the GATT basically aims at the creation and maintenance of a multilateral framework for negotiations for the liberalization of world trade. Among the basic principles employed by GATT in this respect are for example the unconditional most-favoured nation clause.

In the case of the proposed Common Fund, the object is to encourage the conclusion of commodity agreements by provision of finances. This arrangement it is hoped would enable the international community to exert some control on the international commodity markets. It should be observed that the emphasis is on the co-ordination of commodity trade policy by the international community. In this respect the key obligation of the members is to co-operate in global action to improve market structures.

V. Regulatory measures to be employed by the Common Fund

International economic and financial organizations that have as their main aim influencing the prices of

---

14. See for example, Article 2 paragraph 1 of the UN charter.

commodites, or the co-ordination of economic and financial policies for a group of countries, tend to employ in their legal instruments one of a number of measures. These measures include the exchange of information, consultation, and financial incentives.

Financial incentives in general have played an important role in helping international financial organizations achieve a desired course of action. In order to understand fully the system of financial incentives that the Common Fund seeks to employ, it is necessary to mention that the Fund's financial means are obtained on the one hand from contributions by members in the form of shares and in accordance with a formula written in the agreement creating the Fund.[15] On the other hand, part of its resources will be obtained from contributions made by members, resources contributed by International Commodity Organizations, and borrowings made by the Common Fund itself from international money markets.[16]

These resources are to be divided into two accounts, the first account and the second account. The first account is to consist of those resources deriving from members' subscriptions towards the directly contributed capital, deposits made by International Commodity Organizations, voluntary contributions, and borrowings made by the Fund from international money markets.[17] The resources of

---

15. See Article 10 and schedule A of the agreement creating the Common Fund.

16. *Ibid.*, Articles 13 and 14.

17. *Ibid.*, Article 17(A).

the second account shall comprise of directly contributed capital which members may from time to time allocate to the second account in accordance with article 10,[18] voluntary contributions to this account, borrowings and any other resources placed at the disposal of the Fund for the second account operations.

To date financial incentives have been employed by international organizations as instruments of economic policy so far as they are intended to provide an incentive or disincentive for a particular economic course of action desired by a group of states. The promotion of any particular course of action is usually revealed by the conditions attached for the use of such finances. An example of such conditions are applied by the IMF. These conditions as applied in the IMF do provide for the recipient state to follow a certain course of economic action failure to which the incentives provided would be withdrawn.

In the case of the Common Fund, the resources of its first account are to be used mainly to provide loans to associated International Commodity Organizations (ICO) at a low cost of interest.[19] The loans are to be made through a legal arrangement in the form of an association agreement to be concluded between the Common Fund

---

18. This article states that,
"Each member may allocate to the second account a part of its subscription under para 1(a) of this article with a view to an aggregate allocation to the second account, on a voluntary basis, of not less than $70 million."

19. Article 17 para B(4) of the agreement creating the Common Fund.

on the one hand, and the recipient international commodity organization on the other. Such legal arrangements have been employed in a number of other international organizations such as is the case with the research contracts in the Euroatom treaty[18] and the IMF "letters of intent". The detailed legal arrangements for the use of the first account resources are yet to be worked out but the basic principles have been laid down in the agreement creating the Fund.

First it is clear from the agreement that the terms under which any ICO would be allowed to borrow from the Fund would be embodied in agreements to be concluded between the Fund and the ICOs specifying the terms and conditions upon which the loan is made including the repayment terms. Secondly, the general purpose for which loans would be granted from the first account, is to enable the associated ICOs to finance the purchase of commodity stocks to enable them control the fluctuations in the prices of commodities of interest to them.[19] The financial resources of the Common Fund may not be used for any other purpose. In this respect the Fund is required to make arrangements to

> "ensure that the proceeds of any loan or grant made or participated in by the Fund is used only for the purposes for which the loan or grant was made."

Finally, any ICO wishing to benefit from the resources of the Fund is required to enter into an association agreement with the fund specifying among other things that the ICO

---

18. See Article 6 of the Euroatom treaty.
19. Article 16 para B(2) and Article 17 para D section 9(d) of the Common Fund Agreement.

concerned will not borrow from any third party for its buffer stocking unless there is agreement to that effect by the Fund.[28]

The terms that are required to be included in both the loan agreement and the association agreement do tend to suggest that the loans to be offered by the Fund are to be conditional. Such conditional financial incentives have been a source of a lot of friction between the IMF and its borrowing members in the past. One hopes therefore that when the rules and regulations for borrowing from the Common Fund are finally worked out, some serious thought will have been made to provide legal security that will prevent arbitrary decisions being made by the CF to the detriment of some of its members.

VI. Legal safeguards and conditions for use of resources of the Fund

As stated above, the primary purpose of the Common Fund is to provide financing to ICOs in order to enable them meet the costs of operating buffer stocks. This role of the Fund is aimed at tackling one of the main problems that has contributed towards the failure of a number of commodity agreements, and has proved a stumbling block in the conclusion of further agreements. In the Tin agreement for example, the problem over the years had been one of trying to find the best way of financing the activities

20. See Article 16 para E(7) and Article 17 para D subparagraph (b) of the Common Fund Agreement.

of the Tin Council. This problem of financing had been so serious that when in 1976 the Fifth tin agreement was concluded, Bolivia refused to ratify the agreement arguing that it lacked financial resources to contribute to the operations of the organization.[21] Similarly one of the difficulties facing the conclusion of the copper commodity agreement is that of lack of adequate finances to meet the cost of operating a buffer stock.

The Fund's first account seeks therefore to remove this stumbling block by providing the ICOs with the necessary finances for the operation of buffer stocks. While the first account seeks to deal with the problem of price stabilization by way of buffer stocking, the second account seeks to compliment those efforts through financing the programmes of diversification and improvements in the marketing techniques.

In order to safeguard the position of the Fund vis-á-vis the borrowing ICOs and in order to ensure that the Fund's resources are not depleted by the non repayment of loans, the Fund agreement provides certain safeguards.

The first safeguard concerns the maximum amount each associated ICO is to be permitted to borrow. This borrowing limit is referred to as the "maximum financial requirement (MFR)". This MFR would vary from one ICO to another depending on the size of buffer stock they intend to build. The size of the buffer stock for each ICO is

21. See Facts on File, March 12, 1977 at page 169.

to be determined by the respective ICOs. The exact formula for the determination of the maximum limit of borrowing for each ICO will be the cost of acquisiton of stocks which will be determined by multiplying the authorised size of its stocks by an appropriate purchase price.[22]

The second safeguard is that provided for under article 16 paragraph 7 of the agreement which requires the Fund to make arrangements that would ensure that loans or grants made by the Fund are used only for the purposes for which they were made. [23] It is however, not clear as to what arrangements the Fund is permitted to make to ensure that all loans are used for the purpose to which they were procured. The question is as to whether such arrangements could be made internally within the Fund's decision making process or whether such a decision should be made by the Fund in consultation with the associated ICOs. This distinction is important because if these arrangements are made by the Fund alone, then they may be looked upon as conditions imposed from the top and may therefore cause resentment among the ICOS. On the other hand if the ICOS are allowed to participate in the formulation of the arrangements, the problem of resentment may not occur.

---

22. Article 17 para 8 of the Common Fund Agreement.

23. Article 16 para 7 provides inter alia that,
"The Fund shall make arrangements to ensure that the proceeds of any loan or grant made or participated in by the Fund is used only for the purpose for which the loan or grant was made."

The third safeguard seeks to provide the Fund with some measure of control over the stocking activities of the ICOs. This control is necessary because although the Fund should not be able to dictate decisions on such matters as stock sizes, grades stocked, or the location of stock storage sites, it should be able to exercise some influence on the matters because ultimately these issues affect the amounts the ICOs will require to borrow from the Fund. To give legal form to this safeguard, all association agreements concluded between the Fund and the ICOs must state that the ICOs are liable to the Fund for all activities concerning the maintenance, preservation of stocks, handling and holding of such stocks.

As an added dimension to the above safeguards, are a number of lending conditions which appear to be aimed at ensuring that borrowings are made and used in such a manner as to make prompt repayments of loans more likely. These lending conditions, as is the case with most other financial organizations, are to be embodied in a formal agreement to be concluded between the Fund on the one hand and the borrowing ICO on the other. These agreements are referred to as "credit agreements."[24]

The contents of the credit agreement would be the legal reflection of the Fund's policies and decisions regarding such matters as the terms of the loan including the duration, repayment period, and the interest on the

---

24. In the IBRD, the main formal agreements are the loan agreement, the project agreement, the guarantee agreement, the additional contractual arrangements, and the so called supplementary letters.

loan.[25] At the moment it is not possible to predict with any measure of certainty as to what these credit agreements will contain, but only suggest what they may contain on the basis of the experience of other financial institutions.

The IBRD for example, has as its main purpose the financing of development projects in member countries through the promotion of private investment by guaranteeing or participating in loans and other investments, and encouraging the development of productive resources of members by way of guaranteeing or participating in loans and investments.[26] Similarly, the IDA, and the IMF all provide financial resources to states who are members of those organizations.[27] The Common Fund has therefore got special characteristics in the sense that most of its resources, unlike the case with the IBRD, IDA and the IMF are for the use of International Commodity Organizations rather than individual member states. In this respect, the practice of the CF regarding its credit agreements may not follow the exact pattern existing in these other organizations. Although the CF may not follow the exact pattern set in the practice of these other organizations, it is bound to portray some similarities with these organizations. This is because the CF reveals many shared aspects with the other international financial organizations. For example like all

25. Article 17 para 9(d) and Article 18 para 3(h) of the Common Fund agreement.

26. Article 1 of the IBRD Articles of Agreement.

27. See Articles I and V of the IDA Articles of Agreement, September 24, 1960; also article 1(v) of the IMF Articles of Agreement.

such organizations, the CF is a lender of finance . This similarity in nature may result in common issues arising in the CF being tackled in very much the same way as they are tackled in the other organizations. It is only in this limited sense that possible conditions to be included in the CF credit agreement will be discussed and compared with those employed in the other organizations.

All financial institutions in the World Bank Group provide in their loan agreements for what would be termed initial conditions. These are conditions that have to be met before the agreement finally becomes effective. For example, the IDA development credit agreements are not to be effective until satisfactory evidence is furnished to the Association to the effect that the execution and delivery of the agreement on behalf of the borrower has been duly authorized or ratified by all necessary governmental action.[28] As part of the evidence to be furnished is a legal opinion satisfying the Association that the agreement has been duly authorized and executed and that it forms a valid binding obligation. These initial and general conditions apply to all loan and guarantee agreements made by the IBRD and the IFC.[29]

There is no reason to believe that the CF will depart from this practice because it is almost obvious that the

---

28. See Article X section 10.01 of the general conditions applicable to development credit agreements dated Jan. 31, 1969, UN Treaty Series, volume 73 at page 244.

29. See for example, Article 11 of the general conditions applicable to loan and guarantee agreements, January 31, 1969, United Nations Treaty Series, volume 691 at page 300.

Fund would want to satisfy itself that it is dealing with authorized officials of the ICOs. This avoids a situation whereby the legal validity of the credit agreement is brought into question after funds have already been expended.

In addition to these initial conditions, the loan agreements and guarantee agreements made by the IBRD; the development credit agreements of the IDA contain further provisions that spell out the conditons upon which the loans are made. These conditions include conditions for withdrawal from the loan account, payment of interest, payment of commitment charges, and the use of the loan.[30] All these provisions provide the operational modalities for the use of the resources of the lending institution.

It is obvious that the CF will want to make sure that these operational modalities are included in the credit agreements because these matters are important in ensuring that the resources of the Fund are not put to a use other than for what it was intended and also to avoid a situation where its resources are depleted quickly due to non repayment of the loans. One can therefore conclude by saying that the conditions to be included in the CF credit agreements are likely to be very similar to those currently employed by other financial institutions within the World Bank group.

---

30. For an example of these conditions, see ARticle II section 2.01; Article 2 section 2.06; Article III; and Article V of the IBRD-Zambia loan agreement on educational projects, signed at Washington on 11th April 1969, <u>UN Treaty Series</u>, volume 691 at page 240.

VII. The Common Fund's regulatory regime and copper price stabilization

(i) Conclusion of a copper commodity agreement

As mentioned above, the Common Fund seeks to employ a system of financial incentives to achieve commodity price stabilization. With respect to copper therefore, the Common Fund envisages first of all the creation of an international copper agreement concluded between producers and consumers. The activities of the resulting copper organization would then be supervised and co-ordinated by the Common Fund. The idea here is that the co-ordination and supervisory role of the Common Fund would help control the fluctuations in copper prices in so far as the Fund would provide financial resources to such an International Copper Organization enabling it to purchase copper from the market in the event of a downswing in the prices so as to support an effective demand. In periods of upswing in prices, the Common Fund would co-ordinate the release of copper stocks by the organization. Put another way, the idea behind a Common Fund is that the price stabilization process for a commodity like copper would best be achieved through the conclusion of an International Copper Agreement encompassing both producers and consumers of copper, which would provide for a buffer stock. Such a buffer stock would then be supported by the Common Fund thereby enabling the international copper organization to enter the market as purchaser when prices go below an agreed minimum and as seller when they rise beyond an agreed maximum.

Copper appears to be one of those commodities that might benefit very little from the operation of the Common Fund. This is a result of the difficulties encountering the conclusion of a copper commodity agreement. Since 1976, negotiations have been taking place with a view to concluding an international copper agreement but to date no tangible results have been achieved. The main obstacles to the conclusion of such an agreement appear to be two. The first arises from the very nature of international commodity agreements where the interests of the exporting countries are assumed by governments and those of consumers by companies. These interests have continuously been conflicting resulting in deadlocks in negotiations. The second obstacle relates to the mechanism for price stabilisation to be included in a copper agreement. In the negotiations that took place between representatives of exporting and consuming countries in 1979 for example, it became apparent that the two sides were not in agreement as to the appropriate legal mechanisms for the stabilization of copper prices to be included in a copper agreement. The second intergovernmental group of experts on copper, appointed by the sixth preparatory meeting on copper met in Geneva from June 15 to July 6th, 1979. The task of the group of experts was to examine issues relating to the price range, the buffer stock size and financial requirements, for a possible copper agreement.

Two views emerged at the meeting. The first view which was presented by most of the consuming nations, was that the present market system for copper was satisfactory and therefore that what was needed was the creation of a machinery for international consultation. The second view which was shared by most exporting countries, including Zambia, was that it was necessary to correct the market mechanism through an international copper agreement employing the buffer stock mechanism alone or in combination with other measures such as supply management.[31]

At the seventh preparatory meeting on copper however, the two views were reconciled and it was agreed that what was needed for copper price stabilisation was an international copper agreement. Although the need for a copper commodity agreement has now been agreed upon the mechanism to be employed by such an agreement has yet to be agreed upon. The main issues that remain unresolved include the size of the buffer stock, the price band to be supported by such a buffer stock, and whether or not the buffer stock should be used alone or be complemented by supply management.

Unless therefore, exporting and consuming nations reach agreement on these issues there can be no International Copper Agreement and without it, there can be no hope of copper price stabilization proceeding through the integrated programme for commodities and the common fund.

(ii) <u>The Common Fund as an incentive for the conclusion of a copper agreement</u>

Advocates of the Common Fund have argued that the Fund would, when operational work to stimulate the creation

31. CIPEC Secretariat, "Copper Experts meeting in Geneva inconclusive", <u>CIPEC Quarterly Review</u>, April-June 1979, pages 7-9.

of further commodity agreements. This argument is based on the assumption that the cost to members of an international organization in terms of maintaining a buffer stock to stabilize prices would substantially be reduced if they utilize the Common Fund. The argument is that without the Fund, producer countries entering into a commodity organization would have to share equally the financial burden of buffer stocking with consumer countries. This being the case, it is argued that consumers and producer countries would find it fit to enter into international commodity agreements and associate them with the Common Fund in order to take advantage of the financial muscle provided by the Fund.

In the case of copper, this argument does not seem to be plausible because it overlooks at least two issues. First, it overlooks the deep divisions existing between the producers and consumers of copper. As stated above, most consumer countries are reluctant to enter into a stabilizing arrangement for copper because they believe the present market structure is adequate to safeguard the interests of both producers and consumers. The producer countries believe that an international stabilization arrangement is essential if the prices of copper have to be stabilized. In such a situation, it would seem no amount of financial incentive from the Common Fund may in its own persuade these consumer nations to enter into an agreement.

The second point that appears to be overlooked relates to the medium within the Common Fund, to be used to support a copper buffer stock were an international copper agreement to be concluded. The agreement creating the Common Fund makes it clear that buffer stocks created by associated international commodity agreements would be supported from funds in the first window or first account. But it is clear from Article 17 of the agreement creating the Common Fund that the main responsibility for the financing of the first window, lies with the associated International Commodity Organizations. The Article clearly requires the resources of the first window to consist of subscriptions of member countries; cash deposits made by associated International Commodity Organizations; guarantee capital, cash in lieu of guarantee capital and guarantees provided by participants in associated international commodity organizations; voluntary contributions; earnings which may accrue from operations of the first account; special reserves; and stock warrants from associated international commodity organizations.

The heavy reliance by the first account on finances provided by the associated International Commodity Organizations is exemplified by Article 14 of the agreement creating the Fund. According to this Article each associated international commodity organization is required to estimate its maximum financial requirement (MFR) which is the amount needed in order to regulate the market of interest to that organization in accordance with the policy guidelines provided by the Fund. One-third of the MFR is then required to be deposited with the Common Fund and the remaining two-thirds must be provided in the form of capital guarantees. The deposits made by all the associated International Commodity Organizations are then pooled together in the first account and together with other funds available in the account, used to support buffer stocks.

Although the pooling of resources from a number of commodity organizations may result in a larger amount of money available to say a copper buffer stock, this in itself may not work to remove the obstacle to the conclusion of a copper agreement. In fact the reliance on funds provided by commodity agreements may work to reinforce the argument of those consumer countries who believe that the present market mechanism as far as copper is concerned provides an adequate option for the stabilization of copper prices.

VIII. Zambia's attitude towards the Common Fund

Since negotiations leading to the creation of the Common Fund had been conducted on the group system operating within the United Nations system, the attitude of Zambia towards the Fund can only be understood by looking at the position taken by the group of 77 to which Zambia belongs.

The idea of an Integrated Programme for Commodities which was to result in the creation of the Common Fund, was part of the Manila declaration and programme of action of the group of 77 put forward at the fourth session of UNCTAD in 1976. The section of the Manila programme of action on commodities called for the creation of a Common Fund for financing buffer stocks on a product by product basis and the extension of compensatory financing facilities.[32] Since 1976, Zambia's position has been reflected in the position taken by the group of 77 favouring the creation of the Common Fund.

In addition to expressing its views through the group of 77, Zambia has supported the creation of the Common Fund through CIPEC. Even before the Integrated Programme for Commodities was established, Zambia together with other members of CIPEC had shown willingness in negotiating an international copper agreement. To this effect and at the request of CIPEC, UNCTAD convened a consultation meeting on the subject in March of 1976. The CIPEC position at this consultative meeting was clearly that what was required was the conclusion of an international agreement on the stabilization of copper prices taking into account the wider context of the international economic negotiations. The reference to the wider context of the international economic negotiations appears to have reflected CIPEC's preference for such an international commodity agreement to be concluded within some Integrated Programme for Commodities.[33]

Zambia's commitment to the integrated programme for commodities and the Common Fund has been expressed jointly with other members of CIPEC in a number of resolutions passed by that organization's conference of ministers.

---

32. For the text of the section on commodities see 15 ILM 421 (1976).

33. CIPEC Secretariat, "Producers and consumers achieved a substantial level of agreement during their week of discussion in Geneva", CIPEC Quarterly Review, January-March 1976, pages 7-9.

For example, at the XIIIth session of the CIPEC conference of ministers which met in Zaire in July 1978, the conference noted with disappointment the lack of progress on negotiations with consuming countries towards the creation of an international commodity agreement for copper which had been started in March 1976 on the initiative of CIPEC and pursued, since UNCTAD IV in Nairobi, within the framework of resolution 93(IV) of UNCTAD which had instituted an integrated programme for commodities.[34] Similarly, at the CIPEC XVIth conference of ministers held in Lusaka in July 1980, the CIPEC member countries noted with satisfaction the setting up of a Common Fund and expressed the view that the Common Fund would improve the chances of achieving an international commodity agreement for copper, and resolved that CIPEC should assess on a permanent basis the development of UNCTAD's integrated programme for commodities.[35]

In addition to the position held by the group of 77 and CIPEC regarding the integrated programme for commodities, Zambia's commitment to the programme and the Common Fund is evident from the fact that it is one of the countries that has signed and ratified the agreement creating the Common Fund in accordance with Article 54 of the agreement.

---

34. CIPEC Secretariat, "Three meetings in UNCTAD and the XIIIth Conference of CIPEC Ministers", CIPEC Quarterly Review, April-June 1978, pages 10-11.

35. CIPEC Secretariat, "XVI Conference of Ministers of CIPEC - widening the area of the organization's activities", CIPEC Quarterly Review, July-September 1980, page 4.

IX. Decision making in the Common Fund

(i) Distribution of votes in the fund

The problem of decision making portrayed in a number of existing international organizations is likely to affect the proposed Common Fund. The proposed Fund is to be a universal organization in the sense that its membership is open to all states members of the United Nations, United Nations specialized agencies, members of the International Atomic Energy Agency, and international organizations of regional economic integration competent in fields of activity of the Fund.[36] Considering this wide envisaged membership, and the economic and social diversity of the states involved, it would seem completely inappropriate for the Common Fund to employ in its decision making process, the principle of unanimity. The requirement of unanimity could if it were to be employed in the Fund, merely defeat the solidarity that the whole NIEO programme seeks to foster. Even if the principle were to be tainted by allowing the abstaining members not to be bound by the decisions taken, the common interest of the members which the Fund seeks to foster would seriously be impaired. This would result from the fact that abstentions by a few important contributors to the resources of the Fund might result in a decision that cannot be easily implemented.

To avoid this problem, the Fund seeks to employ the weighted voting system which hitherto has been employed by

---

36. See Article 4, Agreement establishing the Common Fund, UN Document ID/IPC/CONF./L.15, adopted on June 27, 1980.

a number of international financial institutions such as the IMF, IBRD, IFC and the IDA. The distribution of votes is to be based on the size of each member's contribution to the Fund. Thus each member country is to be assigned 150 basic votes plus the number of votes allocated to it in respect to shares of directly contributed capital as well as votes allocated to it in relation to any guaranteed capital it puts forward.[37] This weighted allocated of votes has resulted as expected in the economically powerful states such as the United States having an allocation of 11,888 votes, and the least developed countries such as Zambia having 505 votes, Rwanda having 351 votes, Papua New Guinea 389, Mozambique 360 votes and Malawi 351 votes.[38] This vote allocation makes it inevitable that the organizations decisions will tend to reflect the interests of the powerful voters such as the United States and the voting process therefore may work to undermine the solidarity sought in the establishment of the Fund. Furthermore, this kind of voting distribution may result in a situation where voting power is used as a substitute for negotiations and diplomacy.

(ii) Decision making

Like all other organizations employing the weighted system of voting, most decisions in the proposed Fund will

---

37. See Schedule D of agreement creating the Common Fund.

38. Annex attached to Schedule D of the agreement creating the Common Fund provides a list of the vote allocation for member countries.

be taken by a simple majority of the votes cast.[39] In certain important matters however, a qualified majority will be required. Such qualified majorities will be required on important decisions such as the establishment of rules and regulations for the conduct of the business of the Fund; deciding the tenure of office for the Executive Director; the appointment of the Managing Director of the Fund; decisions on the location of the Fund headquarters; suspension of a member; termination of Fund operations; settlement of obligations; and decisions pertaining to the interpretation and application of the provisions of the agreement.[40]

Decision making by simple majority or qualified majority quite apart from the distribution of voting power, has its own shortcomings for an organization such as the Common Fund. The main shortcoming relates to a situation whereby only one or a few states would out vote the majority of states. For example, the votes of the United States, United Kingdom, Canada, France, and the Federal Republic of Germany would be enough to outvote all the remaining countries put together. In such circumstances the chances of the Common Fund being used by the economically powerful states for their own exclusive interest becomes a strong possibility. It is perhaps for this reason

---

39. See Articles 21 section 3 and 23 section 3 of the agreement creating the Common Fund.

40. See Article 20 section 6; Article 22 section 5(b); Article 24 section 11; Article 27; Article 31 section 1; Article 35 section 1; Article 36 section 11; and Article 52 section 2 of the agreement creating the Common Fund.

that the agreement creating the Common Fund seeks to employ, whenever possible the principle of consensus in its decision making. Articles 21 section 2 and 23 section 2 require decisions in the Governing Board and the Executive Board respectively to be taken wherever possible without vote. The principle of consensus in the Fund would enable the adoption of decisions generally accepted by all members without the need for mechanical voting. This principle has been used in a number of other international financial organizations such as the ADB. In the rules of procedure of the ADB for example, the chairman of the Board of Governors and the chairman of the Board of Directors are empowered to ascertain the sense of the meeting in lieu of a vote.[41]

The application of this principle would appear to be an attempt to safeguard the solidarity of the Fund members by making it imperative for members to work out solutions to problems by negotiations, and through concessions until solutions acceptable to all are worked out. This approach if used in practice by the proposed Fund may result in watered down solutions which may not have any immediate practical significance. But taking the diversity of interests represented in the Fund such solutions though watered down by compromises, may go a long way in at least

---

41. Rule 9 of the rules of procedure of the ADB adopted at the first annual meeting of the board of governors held at Lagos, Nigeria between November 4 and 7, 1964. For the full text see ADB; "The general by-laws of the ADB", ADB Document ADB/OS/GR"1, Abidjan, 1966 at pages 9-15.

forming an agreed starting point for the tackling of further problems. This in itself is no mean achievement in a world full of organizations making decisions which have absolutely no practical significance. This decision making procedure may not be the best or most effective but considering the existing organizational set up of most international organizations, it would seem to represent a useful starting point for any future changes.

(iii) <u>The possible influence of individual organs of the proposed Fund on the decision making process</u>

The proposed Common Fund will have, when operational, two decision making organs namely the Governing Council and the Executive Board.[42] Like in most intergovernmental organizations, the Governing Council is to be composed of representatives of all member states and is the supreme policy making organ. This situation obtains also in such organizations as the IMF, the World Bank Group, regional development banks, regional economic groups, and the proposed seabed authority.

In the proposed Fund this organ is to have powers to make decisions on all matters before the Fund, that is both matters of substance and those involving procedure.[43] Although this organ is composed of the representatives of all member countries, the influence of each member in the organ will depend very much on the number of votes they

---

42. See Articles 20, 22, 24 and 25 of the agreement creating the Common Fund.

43. Article 20 of the agreement creating the Common Fund states in section 1 that,
"all powers of the Fund shall be vested in the Governing Council."

hold. As stated above, the number of votes each representative will have at his disposal will depend on his country's contribution to the Fund's financial resources.

Decisions on less important matters may however be delegated by the Governing Council to the Executive Board.[44] In addition to this delegated power, the agreement creating the Fund does give power to the Executive Board to make certain independent decisions. The Executive Board is to consist of 28 Executive Directors appointed by the Governing Council in accordance with certain laid down procedures. The most important of these procedures for purposes of our discussion here, is that which requires candidates to be proposed by a member country and then a ballot conducted upon which 28 members receiving the highest votes are declared elected. This procedure leaves a lot to be desired.

First, since the Executive Board does have powers to make decisions in certain procedural and substantive matters, the issue of the independence of such an organ assumes significant importance. From a formal point of view, it is possible to have an Executive Board selected by only one group of countries sharing the same interests. In such an eventuality, the independence of such an organ as far as the rest of the members are concerned is bound to be suspect and may in the long run undermine the decisions it takes.

Secondly, it is worth remembering that the Common Fund was created to complement the activities of international

44. See Article 20 section 3 of agreement creating the Common Fund.

commodity organizations. It is entirely possible however, the procedures for the selection of Executive Directors may result in an absurd situation in which member states belonging to one commodity organization are not represented at all in this organ. Take for example, a situation in which a candidate proposed by a copper producing member country is not one of the 28 elected candidates. It is doubtful whether in such a situation decisions on matters pertaining to the marketing of copper would receive proper attention and sympathy in the same way as would be the case if one of the elected members came from a copper exporting country.

A more acceptable arrangement would seem to be one that requires some form of collective appointment of members of this organ. This could be done by allowing member countries proposing candidates other than their nationals such as is the case in the Andean sub-regional economic group. In that grouping, the main decision making organs are the Commission and the Board popularly known as the Junta.[45] While the Commission is the supreme decision making organ and is composed of representatives of all member countries in the subregion, the Junta consists of three persons, independent from the member countries and may in fact be nationals of countries outside the subregion.

---

45. See Article 5 of the agreement creating the Andean group. For the full text, see, Mutharika, P., International Law of Development, volume 4,(1977), Oceana publications, Washington DC, p.2255.

These persons are required to act in the interest of the subregion as a whole and not in the interest of any one of the member countries.

It must be conceded that the arrangement of the Andean Group may not work well in an organization of universal membership such as the Common Fund, but one may suggest a slightly modified arrangement. Such an arrangement may for example require that groups of countries, exporters of specified commodities should be assigned the responsibility of selecting a given number of the Executive Directors. For example, the members of each commodity organization could be assigned one or two seats in the Board. This could be done for all the existing commodity organizations representing the ten core commodities that have been selected for the integrated programme for commodities.

There are two more organs of the proposed Common Fund to which only minimal comment is called for. These are the consultative Committee and the Managing Director and his staff. The role of the Consultative Committee in the Fund's decision making process is limited to advising the Executive Board on various technical matters. The composition of this organ is to be determined by the Governing Council which is required to take into consideration factors such as equitable geographical distribution of its members, and individual expertise in commodity development issues. The role to be played by this organ in influencing the decisions of the Fund would seem to be very insignificant and calls for no further comment.

The last organ, which may play a significant role in the decision making process of the Fund is to be composed of the Managing Director and his staff. It should be pointed out that in many international organizations the role of this kind of staff has traditionally been limited to functions of an administrative nature. This would appear to be true of the proposed Fund which is assigned the role of conducting the ordinary business of the Fund.[46] But in practice it may assume a more significant role if it follows the foot steps of other international financial institutions. In many of the existing international financial institutions this type of officials do play a more significant role than merely acting as the organizations' administrative officers. These officers are often in addition to their normal duties called to prepare draft decisions for the other organs.[47] In this sense they can influence substantially the decisions of the competent organs.

In some international financial institutions these officials in practice dictate the decisions that eventually emerge in the competent organs. This is clearly the case in the IBRD where in practice credits can only be granted to member states or other institutions if the opinion of the President of the Bank favours such a move. The Executive

46. See Article 24 of the agreement establishing the Common Fund.

47. According to an interview the author conducted with Mr. Peter Parkinson, Director of Marketing at the CIPEC Secretariat in Paris in December 1982, this situation is also obtained within CIPEC.

Directors who are formerly assigned the task of making decisions on such matters, do in practice refuse to consider a request which has received an unfavourable opinion from the President of the Bank. Should the proposed Fund follow the practice of these other international financial organizations, the role of the Managing Director in the decision making process may prove to be very substantial. In this respect if one of the goals of the New International Economic Order is to increase the bargaining leverage of the developing countries in international organizations, one would have expected to see in the Common Fund agreement a provision which would ensure that the position of the Managing Director rotates between the developed countries and the developing countries, or the position is filled by a person whose sympathies lie with disadvantaged developing countries.

X. Conclusion

One of the problems that has been frustrating efforts at the conclusion of an international copper agreement has been that of the cost of establishing a copper buffer stock. For the copper producer developing countries therefore, the usefulness of the Common Fund will be judged by its ability to finance such a buffer stock. The availability of adequate financial resources from the Fund may actually act as a stimulant to the establishment of a copper agreement.

It should be pointed out that UNCTAD's estimates indicate that an adequate copper buffer stock would need at least 1,029,000 tons,[48] which it is estimated would cost about $2 billion. When one considers that the Common Fund will initially deal with the ten core commodities in the integrated programme for commodities, it becomes clear that it will require substantial financial resources to be able to finance an adequate copper buffer stock. But even if the resources of the Fund finally raised amounted to only $6 billion, there seems to be nothing to stop a new copper commodity agreement estbalishing say a $2 billion worth of buffer stock. This is because the resources of the Fund are to be used as a guarantee for borrowing from the international money markets. The role of the Common Fund in stabilizing copper prices will therefore be determined by its ability to mobilize financial resources, adequate to set up reasonable buffer stocks.

Coupled with the issue of resource mobilization is the question of the bargaining leverage in the decision making process. The policy of the Fund regarding the use of its resources will be determined by the two policy making organs, the governing council and the executive board. The decision making process in the two organs will be based on the weighted system of voting which gives more votes to those states who contribute more to the resources of the Fund. Since the important contributors are bound to be the developed countries, the producer developing countries are likely to have less say in the decisions that will emerge. This raises the questions as to the effectiveness of the Fund in relation

48. CIPEC Secretariat, "At the Conference table". CIPEC Quarterly Review, January-March 1979, page 13.

to the stabilization of commodity prices in general and copper in particular. It should be recalled that one of the criticisms that developing countries have been making regarding international organizations is the uneven distribution of votes. This has been a consistent pattern in all institutions where decisions carry any weight such as in the IBRD, and the IMF. In these institutions, it is possible for the developed and industrialized countries who have big shares of votes to take decisions and formulate policies without taking into account the interests of the developing countries.

Although the Integrated Programme for Commodities and the Common Fund may have been formulated taking into account the principle of solidarity, the voting arrangements have not departed very much from those employed in other financial institutions. It is true that under the Common Fund agreement, the industrialized countries may not have as many votes as to disregard the interests of the developing countries. But they hold sufficient votes to be able to make it impossible for developing countries to pass certain decisions since many decisions are required to be approved by a highly qualified majority. This majority requires a 75% of the total votes in all important matters. The resulting effect is that the voting power in the Common Fund maintains the same system that has been a subject of strong objections from developing countries. This situation makes it doubtful whether once the common fund becomes operational it may actually work to the satisfaction of commodity producers such as Zambia.

For Zambia which depends almost entirely on copper for its export earnings to benefit from the commodity stabilization scheme provided by the Common Fund therefore, a number of difficult issues have to be overcome. First, Zambia and other copper exporting countries on the one hand, and copper consuming countries on the other, must redouble their efforts in negotiating a copper agreement. The conclusion of such an agreement would appear to be the only way in which copper price stabilization may be attempted within the framework of the Common Fund. Secondly, efforts should be made within the Common Fund to increase the resources that are available to commodity organizations wishing to maintain a buffer stock. It is true that the agreement creating the Common Fund makes it possible for the fund to borrow from international money markets. But this may not always work smoothly since it requires some form of willingness on the financial institutions to support the efforts of the fund. This is particularly so when one considers that the financial institutions relied on are located in the commodity consuming nations - the same nations that appear unwilling to facilitate the conclusion of commodity agreements.

Despite this rather pessimistic picture of the common fund however, copper exporting nations will do well to continue fighting for the conclusion of a copper agreement since however minimal the effect the Common Fund may have on the stabilization of copper prices, such an effect is worth fighting for. Until the common fund becomes fully operational however, producers of copper would do well by continuing to search for other alternative approaches. One such approach involves the use of a producers' association in stabilizing copper prices. Copper producing countries have attempted using this machinery in CIPEC. The next chapter discusses this organization, its role in copper price stabilization, and the implications of Zambia's membership in the organization.

CHAPTER SIX

PRODUCERS' ASSOCIATION APPROACH: ZAMBIA'S MEMBERSHIP IN CIPEC

I. The failure of the commodity agreement approach

If one accepts that primary commodity producing countries, particularly those in the developing world, must be in a position to exert some considerable influence on the markets for their commodities, then it becomes clear that for many commodities the concept of "commodity agreements" has not succeeded to provide this influence. In fact only very limited success has been evident under these agreements. Over a period covering over two decades, only six such agreements were concluded. These were for coffee, cocoa, sugar, tin, wheat, and olive oil.[1] More recently, only one agreement has been concluded under the United Nations Integrated Programme for Commodities. This is the international Jute agreement which unlike the earlier commodity agreements, does not employ any market control mechanisms such as quotas or a buffer stock. This agreement which was adopted on the 1st October 1982, when it becomes operational will depend entirely on the second window of the Common Fund.[2] The implications of this approach are difficult to predict.

---

1. Alfred Maizels, "A new international strategy for primary commodities", in G.K. Helleiner (ed.), A world divided, the less developed countries in the international economy (1978) Cambridge University Press, p.32.
2. U. Wasserman, "UNCTAD: International Jute Agreement", (1983) Journal of World Trade Law, 65.

As we have seen in Chapter V however, the Common Fund is yet to be activated because of the lack of the required number of ratifications. Since this is the fifth year since the signing of the agreement creating the Common Fund and the requisite number of ratifications is yet to be attained, it seems as though the Common Fund agreement is destined to end as a dead letter.

The fact that the Common Fund appears to be a non starter coupled with difficulties involved in negotiating commodity agreements clearly represents a failure of the approach in tackling the problem of copper price fluctuations.

The failure of this approach, in many ways, reflects the inherent conflict of interest between producers and consumers in matters of commodity marketing. This conflict it would seem, is more pronounced in the case of minerals because so far only one mineral product - tin, has been a subject of a commodity agreement. Copper which is an important export for a number of developing countries, has in recent years been a subject of prolonged and unsuccessful negotiations which were aimed at the conclusion of a commodity agreement for the metal. For more than six years, negotiations between producers and consumers of copper have been conducted under the United Nations integrated programme for commodities (IPC) in an attempt to conclude an international copper agreement. These negotiations have proved fruitless and have only helped to highlight the conflicting interests of copper exporting countries on the one hand and copper consumers on the other. The failure of the exporter-consumer commodity agreement approach in the case of copper has left copper exporting countries virtually unprotected from the sudden and sometimes substantial movements in the copper prices on the world markets. It is the awareness of this state of affairs which acted as a catalyst to copper exporting developing countries to attempt an altogether new approach in an effort to gain some measure of control over commodity markets. This approach involved the formation of a producers' group with the aim of seeking ways and means of influencing copper prices. The awareness of the actual and potential benefits of such a producers' group has not only been confined to copper producers as is evident in the number of such groups that have come into being in recent years. To date about 18 producers' associations do exist incorporating producers of 18 commodities. Such groups exist at intergovernmental level, in petroleum, bauxite, copper, iron ore, mercury, rubber, banana, phosphate rock, cocoa, coffee, timber, coconut, pepper, groundnuts, tungsten, jute, tea and oil seeds.

This chapter attempts to examine the legal aspects of one of these producers associations - the Intergovernmental Council of Copper Exporting Countries (CIPEC). The discussion will be centred on the legal nature of such an association, institutional organisation, its activities and prospects. It is however necessary at the beginning to briefly discuss the origins and legality of the general concept of a producers' association.

II. The concept of a producers' association

While international commodity organisations, such as the international tin council exist to administer detailed agreements between exporters and consumers, producers' associations are a creation of a more general type of agreement which bring together only the exporters of various commodities. The main aim of any producers' association therefore is to attempt to give control of the commodity market to the exporters without equal participation by the consumers. Commodity market control action by producers alone, as opposed to control by both producers and consumers have generally, and perhaps unfairly, been characterised as cartels and therefore undesirable.[3] Such characterization evidently ignores the fact that producer actions may be of several types and may therefore not all have the same aims and effects. Thus for example, an association of private producers aimed at limiting production or allocating markets for purposes of increasing prices may be categorised as a harmful cartel. But an association of exporting countries which aims at adopting similar policies for its members with respect to marketing and pricing practices may not necessarily be a harmful cartel. Since the term cartel has been associated with harmful and undesirable associations of producers, it would be unfair and indeed undesirable to use the term in relation to associations of exporting developing countries which in most cases are neither aimed at increasing the market price nor are they aimed at supply management. For example, when one examines the International Bauxite Association (IBA) constitution, it is clear that the association's main goals are the coordination of production, processing, and marketing of bauxite among the members and not increasing the market price

---

3. H. Kronstein, The law of international cartels.(1973) Cornell University Press, Ithaca.

of bauxite.[4] Another example is the constitution of Intergovernmental Council of Copper Exporting Countries (CIPEC) which concentrates at the coordination of measures aimed at raising real earnings from copper exports, harmonize production and marketing, and enhance the solidarity between the members.[5]

Strictly speaking therefore, producers' associations contain broad goals and are not restricted to the goal of raising prices as were the early 19th century private producer associations. On this ground alone, it should be possible to distinguish a pure cartel from a producers association. Despite "cartel" connotations wrongly being levelled on producers' associations, these associations have continued to provide one of the most efficient means at the disposal of the developing countries for protecting their natural resources. By encouraging cooperation between producers and coordination of production and marketing policies, these associations are helping member countries guarantee the full exercise of sovereignty over their natural resources.[6]

III. Evolution of Producers' Associations

Although intergovernmental associations of producers had existed as far back as 1933 when the International Tea Committee (ITC) was formed, producers' associations in the

4. Article III, The International Bauxite Agreement (IBA). For an official text, see international legal materials, vol.13 (1974), pp.1245-1253.

5. Article 1, The Intergovernmental Council of Copper Exporting Countries' Agreement, Mimeo, Paris, 3rd July 1981.

6. See General Assembly resolution on permanent sovereignty over natural resources. United Nations General Assembly resolution 3171/XXVIII.
Also George Elian, The principle of sovereignty over natural resources, Sijthoff and Noordhaff 1979.

form they exist today are a recent phenomenon. The present producers' associations have evolved mainly through the political activities of the non-aligned movement and the United Nations system.

The first major push for the conclusion of producers' associations was made in 1955 at the Asian-African Conference in Bandung. The final communique issued at the end of this conference called for collective action by producers in developing countries for purposes of

> "stabilizing the international prices of and demand for primary commodities through bilateral and multilateral arrangements...."[7]

The Bandung conference led six years later to the creation of the non-aligned movement. At the first conference of heads of state and governments of the non-aligned countries, held in Belgrade, Yugoslavia in 1961, demands were again made for

> "just terms of trade for the economically less-developed countries and in particular, constructive efforts to eliminate the excessive fluctuations in primary commodity trade..."[8]

In 1962 a special conference on the problems of economic development was held in Cairo, Egypt, and brought together many developing countries. In the conference's final declaration, it was agreed that,

---

7. Final communique, The Asian-African Conference held in Bandung between April 18 and 24, 1955. For an official text, see Odette Jankowitsch and Karl P. Sauvant, The world without superpowers. The collective documents of the non-aligned countries, volume one, (1978) Oceana publications Inc., New York, pp. I-VIII.

8. First conference of Heads of state or governments of non-aligned countries' declaration, Belgrade, September 1961 para 21. For a complete text see Jankowitsch and Sauvant, volume one chapter one at page 6.

> "close cooperation should be established amongst developing countries producing primary commodities with a view to coping with marketing problems, including improvement of quality, as well as other matters relating to the exchange of goods and services."[9]

The third conference of the non-aligned countries met in Lusaka, Zambia in 1970 and amongst other things, the participants in their final declaration pledged,

> "to organise exchange of information in regard to products of export interest to developing countries."[10]

But like in the last two conferences, no action programme was spelt out as to what approach the envisaged producer co-operation should take. It was not until the fourth non-aligned conference held in Algiers, Algeria in 1973 that such an action programme was spelt out. For the first time, there is mention of formation of producers' associations. In the programme of action for economic cooperation that was adopted at this conference, developing countries are encouraged to,

> "establish and strengthen producers' associations in respect of major commodities of importance to the world economy in order to halt the deterioration in their terms of trade, eliminate unhealthy competition, prevent harmful activities on the part of multinational corporations and strengthn their bargaining power."[11]

The call for formation of producers' associations appears to have been necessitated by the slow progress that had been made in relation to the conclusion of international commodity agreements under the Havana principles. This was made clear at the same conference when it was stated that,

---

9. <u>Ibid</u>., para 26 at page 73.

10. The complete text of the declaration can be found in Jankowitsch and Sauvant, pages 85 to 90.

11. "The action programme for economic cooperation" in Jankowitsch and Sauvant, volume one, para XII at page 228.

> "(the) progress made towards the formulation of international commodity agreements has so far been extremely slow. The competent international bodies should give priority to this work. The problem of commodities like tea which have suffered a continuous decline in price, should be dealt with expeditiously on the basis of global agreements."[12]

At the fifth non-aligned conference held in Colombo, Sri Lanka in 1976, a firm call was made to all developing countries,

> "to enter, as soon as possible into negotiations with a view to establishing qualitative organizations for producers, that is, producers' association, which would enable them to safeguard their rights and exercise full and permanent sovereignty over their natural resources and the national utilization of such resources for their economic development..."[13]

The various declarations and resolutions of the non-aligned movement calling for the creation of producers' associations are political pronouncements emanating from a political organisation. In this respect therefore, it is difficult for one to claim that there is a duty upon states to enter into these associations or indeed a duty to establish them. The legality of these associations cannot therefore emanate from these political pronouncements of the non-aligned movement but perhaps in later resolutions of the United Nations. The right to enter into producers' associations was emphatically asserted in the United Nations declaration and programme of action for the establishment of the new international economic order (NIEO). The declaration,[14] specifies that NIEO should be founded among other things on:

---

12. Ibid., p.233.

13. Para 15 of resolution 25 of the fifth non-aligned conference. See complete text in Jankowitsch and Sauvant, The world without superpowers, (1978) Oceana publications, New York, pp.892-897.

14. See General Assembly resolution 3201 (S-VI)

> "facilitating the role which producers' associations may play within the framework of international co-operation, and in pursuance of their aims, inter alia assisting in the promotion of sustained growth of the world economy and accelerating the development of developing countries."

Significant recognition of the right to enter into such associations was made in the charter of economic rights and duties of states where it is stated that:

> "All states have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all states have the duty to respect that right by refraining from economic and political measures that would limit it."15

Although this resolution clearly purports to create a rule of international law, one question still remains. Is it possible for a resolution of the General Assembly to create a legal right and bestow it on states. Put another way, the question is, of what legal effect are the resolutions of the General Assembly?

The General Assembly is one of the principal organs of the United Nations. Article 13 of the charter of the United Nations provides that the assembly shall initiate studies and make recommendations in order to promote, inter alia, international cooperation in the economic, social, cultural, educational, and health fields. In addition to this, article 10 empowers the General Assembly to discuss and make recommendations on any question or matter within the scope of the charter. Since matters of economic development are within the scope of the charter, the General Assembly in proclaiming the charter of economic rights and duties of

15. General Assembly resolution 3281 (XXIX) of 12th December 1974.

states, was properly performing its functions. The question however, is whether in performing its rightful functions under the charter, the General Assembly can create new rules of law to bind states. It is generally accepted that the General Assembly has no legislative powers similar to those of a legislature in municipal law, and it can therefore not create laws.[16] This position is emphasized by the statute of the international court of Justice which requires the court to apply as its sources of law, international conventions, international custom, general principles of law, and decisions of judicial bodies and teachings of publicists.[17] It is clear from this that resolutions of organs of international organisations such as The United Nations cannot without doubt be regarded as capable of creating legal rights or obligations. From this reasoning it is therefore doubtful that resolutions of the United Nations General Assembly regarding producers' association could have created a legally binding obligation on states to enter into such associations.

Even though the effect of the various resolutions regarding producers' associations is in doubt, the practice of international organizations such as the United Nations indicates that certain of their resolutions may have the effect of changing the rights and obligations of states over a period of time. This may not accurately be regarded as a case of law making but nevertheless the important aspect of quasi-legislative power. In this regard, it would seem that

---

16. See for example, D.W. Greig, International Law, (1976) - Butterworths , pages 32-24.

17. Article 36 para 1 of the International Court of Justice statute.

the right to form producers' associations contained in the charter of economic rights and duties, is evidence of a developed custom or practice by states. In the Barcelona traction case,[18] state practice was held to be,

> "manifest within international organisations and conferences."

In this regard Judge Ammoun, pointed out that it could not

> "be denied, with regard to the resolutions, which emerge therefrom, or better, with regard to the votes expressed therein in the name of states, that these amount to precedents contributing to the formation of custom."

As stated in the North Sea Continental Shelf case,[19]

> "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, that is, the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation."

In the case of producers' associations there is little doubt that by passing a resolution in the General Assembly asserting the right to form such associations, the various countries, members of the United Nations were endorsing an existing practice and believing that such a practice had been transformed into a legal obligation. If this reasoning is accepted, then the legal foundation for the right to form producers' associations lies in the practice of states which has been transformed into an international custom.

18. [1970] ICJ Reports, 303.

19. [1969] ICJ Reports, 3 at p.44

IV. Legal nature of producers' associations

The first characteristic of any producer association, is that it is created by an international agreement involving two or more states. Such an agreement then becomes the basis of the members' legal obligations. This is because international law embodies a principle of great importance found in the maxim pacta sunt servanda as governing relations between parties to an international agreement. The maxim recognises that commitments publicly and voluntarily made by states must be honoured. This indeed is a principle that lies at the core of the successful operation of any agreement between states. This principle has now been put beyond any doubt by being codified into the Vienna convention on the Law of Treaties. That convention specifies that,

> "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[20]

The second characteristic involves the question of such an associations' capacity in international law, that is, whether it would be regarded as a subject of international law. As is generally recognized, a subject of international law is any entity capable of possessing international rights and duties and having the capacity to bring international claims.[21] The attributes of international legal personality are regarded as: capacity to make claims in respect of breaches of international law; capacity to enter into treaties

---

20. Article 26 of the Vienna Convention on the law of treaties (1969). For a complete official text of the Convention, see (1969) 8 International Legal Materials at page 679.

21. Reparation for injuries suffered in the service of the United Nations Case, [1949] ICJ Reports, 179.

or agreements which are valid under international law; and capacity to enjoy privileges and immunities from national jurisdictions. States by their very nature, do have all the three attributes and are therefore clearly subjects of international law. Apart from states however, some international organizations may have these attributes. The question is however, how to determine that one organisation has or does not have the necessary attributes of international legal personality. In a system where there is no constitutional requirement for registration of associations as international legal persons, the test for determining the personality seems to be functional. The functional test was discussed in an important case, in relation to the United Nations. In the Reparation for Injuries Suffered in the Service of the United Nations,[22] the International Court of Justice in issuing its advisory opinion on the capacity of the United Nations as an organisation to bring an international claim in respect of injuries to its agents, utilized a functional test. Using this test, the court reached the opinion that, the organization was intended to enjoy and exercise, and in fact enjoys and exercises, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and capacity to operate upon an international plane. Accordingly, the court concluded that the organisation had international legal personality.

---

22. Ibid. p.180

A similar reasoning may apply to producers' associations if they are regarded as international organizations. According to the International Law Commission, an international organisation, is an association of states established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member states.[23] Producers associations as constituted at the moment are exclusively associations of states. This requirement of statehood is considered very important as far as membership of these associations is concerned. This is reflected in the fact that a number of these associations have specifically provided this requirement in their constitutions.[24] Apart from being associations of states, they are all created by treaty and have distinct organs for the administration of the treaties. The last criterion presented by the International Law Commission relates to a legal personality distinct from that of the member states. Evidence of the distinct personality can usually be found in the multilateral agreement signed by members regarding the status of the organization. Such an agreement was for example signed in Lusaka on 26th June 1974 in relation to CIPEC. Furthermore, the headquarters agreements that are entered into between producers associations and the host countries do presuppose

---

23. See The Yearbook of the International Law Commission (1968) at p.124.

24. For example, Articles 2 of CIPEC agreement and 1 of the IBA's agreement. A similar article is found in the statute of the Latin American and Caribbean Sugar Exporting Countries (GEPLACEA), Article 2 of this statute provides that members of the group are the independent Latin American and Caribbean countries which are traditional sugar exporters.

these associations' international legal personality.[25] There is no doubt therefore that producers' associations are international organizations and may be regarded as possessing international legal personality.

V. The Intergovernmental Council of Copper Exporting Countries (CIPEC)

(i) Background

CIPEC was created in 1967 and became the first producers' association grouping together a number of developing countries and covering a mineral commodity. Prior to 1967, there had been in existence a number of such associations grouping raw material producers from developing countries but none covered a mineral product. Regarding agricultural commodities, the African Groundnut Council had been formed in 1964, the InterAfrican Coffee Organisation in 1960, the ocoa roducers lliance in 1962, the International Tea Committee formed in 1933 and renewed in 1950. In fuel, the organisation of petroleum exporting countries (OPEC) was established in 1960.

A number of factors prevailing in the early 1960s made the creation of a producers' association in copper possible. The most significant of these factors was the gaining of political independence by a number of copper producing developing countries. Political independence necessitated economic control by the new independent governments. The main desire of these governments was to be able to

---

25. Headquarters agreements have been entered into by many producers associations, for example, CIPEC and IBA.

exert some influence from production to marketing of the raw materials upon which their economies depended. The production stage could be dealt with at an appropriate time by domestic measures of nationalization. The marketing aspect however, could not be effectively dealt with within the municipal spheres and needed concerted international efforts. This is because the marketing problems of raw materials tend to transcend the various national boundaries. In the 1960s there was an increasing awareness by producers of raw materials that one approach to tackling the raw material marketing problems, was the creation of producers' associations.

The first initiative by copper producing countries towards the creation of a producers' association, was made in November 1966 during President Kaunda's visit to Chile. At the end of this visit a joint declaration was issued on behalf of the Presidents of Zambia and Chile. In this declaration, they observed that:

> "The principal economic link between Chile and Zambia is their common condition as large-scale copper producers. Chile and Zambia have strong positions in the world copper market and although they produce only 30% of the world total, their influence on the supply of copper for the free world market can be estimated at approximately 65% to 70%. If the production of Peru and Congo (Zaire) is added to those of Chile and Zambia, it appears that these four countries jointly supply three-quarters of world net copper exports."[26]

This realization clearly made the possibility of a closer association between the copper producing developing countries a real possibility. Indeed the talks that followed this visit culminated in the creation of CIPEC.

---

26. Jean d'Hainaut, "A brief glimpse of CIPEC". CIPEC Doc. Info/251/79 p.4.

(ii) Membership

(a) Full members

Membership in CIPEC, like that of other international organizations is divided into two categories - full members and associate members.[27] Full members are further sub-divided into original members and subsequently admitted members. As in the case of the United Nations Charter which provides that the original members of the organization shall be states which having participated at the San Francisco conference,

> "sign the present charter and ratify it"

the CIPEC agreement requires founder members to be

> "...those countries which were represented at the first conference held in Lusaka and which signed the original agreement which established the organisation." 28

The original or founder membership poses few problems, if any, because it depends on participation at the conference establishing the particular organization, in this case CIPEC, and ratification of the agreement. In the case of CIPEC, four countries fall in this category - Chile, Peru, Zaire and Zambia.

The second category of full members in CIPEC covers those countries that have subsequently joined the organisation as full members. In relation to subsequent full membership, problems may arise in relation to their admission into the organisation. The criteria for admission to full

---

27. Article 2 of the CIPEC agreement.
28. Article 2(a) of the CIPEC agreement.

membership is stated in article 2(c) of the CIPEC agreement. Under that criteria,

> "any producer country with a substantial net export of copper produced from ore originating in the country and which has fundamentally similar interests to those of member countries may become a full member of the organization if accepted unanimously by the full members."

There are three important aspects to this criteria which it would seem must be satisfied before admission.

First, the subsequent full membership is open to copper producing and exporting states. The requirement of statehood is exemplified by an incident that had to be dealt with by the CIPEC secretariat a few years ago. At that time a province in Canada approached the Secretariat and informally expressed its wish to join CIPEC. The Secretariat refused to accept the proposition because it considered that membership was limited to states.[29]

The second requirement for this type of membership is that the country concerned must be a substantial net exporter of copper. Considering this criterion it seems obvious that major exporters of copper such as Chile (over a million tons exported in 1981), Peru (312 thousand tons exported in 1981), Zaire (463 thousand tons in 1981), and Zambia (556 thousand tons in 1981) would easily qualify as full members even if they had not been founder members. But as it is they were all founder members and their full membership status therefore, stems from this fact. The question however arises in relation to another full member, Indonesia. The export capacity of Indonesia was 59 thousand tons in 1981.

29. Interview with Mr. P. Parkinson, director of Marketing Policy in CIPEC, conducted by the writer in December 1982.

This figure was lower than that for Australia and Papua New Guinea (124 thousand and 171 thousand tons respectively).[30] On the basis of these figures, Papua New Guinea and Australia should have been admitted as full members prior to the admission of Indonesia. It is however, possible that Australia and Papua New Guinea did not satisfy the third criteria below or simply preferred another type of membership. This was certainly the case with Australia which requested admission as Associate member and not a full member. The advantage of this for Australia was that associate membership in CIPEC does not carry with it voting rights and therefore such members are not bound by the decisions reached. This position seems to suit Australia because its mining industry is largely privately controlled and would have made it difficult for the government to impose CIPEC decisions on the private owners.

The final requirement is that of having fundamentally similar interests to those of member countries and accepted unanimously as such. The CIPEC agreement does not specifically mention the interests of its members but one can deduce these from the various aims of the organisation. These include coordination of political and commercial policies, and copper price stabilization. The unanimous acceptance of a country as a full member would presuppose that it had similar interests to those of other members.

The problem that may arise with such membership require-

---

30. CIPEC Secretariat, Statistical bulletin, 1981, page 7.

ments is whether they can occasionally be ignored or whether they must be followed strictly in each admission case. A similar problem had arisen after the Second World War regarding membership in the United Nations. The International Court of Justice (ICJ) was requested to deliver an advisory opinion on the legality of making admission to the United Nations subject to conditions other than those set out in the charter. The ICJ was divided on the issue the majority holding that additional conditions were not legitimate.[31] Since CIPEC is an international organization, the courts reasoning may be said to apply to it. Applying the courts reasoning to CIPEC, it may be said that the conditions set in article 2 of CIPEC are to be regarded as sole conditions needed to be satisfied before an applicant state is admitted as a full member.

(b) Associate membership

The associate membership status has been used in a number of international organisations in order to enable some states to take advantage of the organisations even though they do not qualify to be full members. The United Nations charter, for example, does not provide for this type of membership but over the years the General Assembly has created a form of such membership by granting observer status to those entities that do not qualify to full membership.

Originally, the CIPEC agreement did not provide for associate membership but only full membership. The difficulty

31. Conditions of Admission to membership in the United Nations, [1948] ICJ Reports, 68 .

in meeting the full membership criteria, meant that for the first seven years of the organisation's existence its membership was confined to the four founder members. If one believes the success of any producer association as dependent on the harmonization of the interests of as many producers of the commodity as possible, the limited membership of CIPEC might have reduced its effectiveness.

A determined effort both to enlarge the organisation and to establish and strengthen links with producers outside the four founder members was initiated at CIPEC's fifth ministerial conference held in Lusaka in May 1974. At that conference, the then Zambian Prime Minister, Mr M.Chona observed that it was odd that an organization which began with four members in 1967 should still have the original numbers in 1974.[32] Mr. Chona called for an increase in the membership of CIPEC to bring in other producers whose support would be vital in the years that lie ahead. In response to Mr. Chona's call, the conference of ministers amended the initial CIPEC agreement to provide, inter alia, for the admission as associate members those copper exporting countries whose economies do not depend on copper to the same extent as in the case of the original members.[33] The amendment therefore opened the associate membership to those countries who were or were about to become net exporters of copper as

---

32. The Times of Zambia, 24th June 1974; and The Financial Times of 25th June 1974.

33. CIPEC Quarterly Review, 10th anniversary issue (1977) at page 13.
See also the Final communique of the 5th ministerial conference of CIPEC.

opposed to substantial net exporters in the full membership criteria.[34] As a consquence of this amendment, three countries Australia, Papua New Guinea, and Mauritania were admitted to CIPEC as associate members in 1975 and 1976.

Unlike full membership, associate membership does not carry with it the right to vote.[35] This lack of voting rights means in practice that such members are not bound by decisions reached in the various organs of CIPEC. This situation suits countries like Australia where there exists a clear distinction between the mining companies and the government. This government would not wish to be committed to CIPEC decisions, such as production cuts when as a government it was powerless to enforce it in its own territory. Although this arrangement suits Australia, it has clearly contributed to CIPEC's weakness as the experience of the past few years would seem to indicate.

All major decisions taken in the various CIPEC organs are binding on the full members and associate members are not obliged to abide by them. This situation raises the question of the effectiveness of CIPEC's decisions if other members are at liberty to ignore them. Thus for example, in March 1978, three of the full members agreed to a production cut of 15% in an effort to stabilize the world copper prices. Chile, which is another important full member opposed a reduction of output and since under the CIPEC rules of procedure such a decision required a unanimous

---

34. Article 2(d) of the CIPEC agreement.
35. Ibid., Article 2(e).

vote no definitive decision could be agreed. This lack of unanimity clearly highlighted the organisations weakness. But even if Chile sided with the other full members, it must be questionable whether a mandatory cut by full members only and a voluntary cut by associate members would have been effective in achieving the desired goals.

A number of producers associations have avoided this difficulty by providing for only one type of membership. For example, the International Bauxite Association has only one type of membership - full membership.[36] A uniform type of membership for all CIPEC members is likely to increase the credibility of the organisation, at least once agreement has been reached all members would be obliged to abide by the decisions. It might be argued that in such a situation difficulties would be encountered in reaching unanimity. This however, does not seem to be a sufficient reason for the organization to provide access to countries through associate membership without them incurring any obligations whenever an important decision is made.

(ii) CIPEC as an international legal person

It is generally accepted that in the international community there is no constitutional authority that confers international legal personality on an institution or association such as CIPEC.[37] The lack of such an authority however, does not mean that such institutions automatically

36. See article II of the International Bauxite Association's agreement.

37. Knight and Searle v Dove [1964] 2Q.B. 631.

lack international legal personality. As stated earlier, the test that has been used in determining the legal personality of such institutions has been a functional one. In its advisory opinion, the ICJ in determining whether the United Nations as an organisation, could bring an international claim in respect to injury caused to its agents employed a functional approach. It pointed out that for the United Nations to achieve its desired objectives, and to properly carry out its functions, it must necessarily be endowed with international legal personality and therefore capable of possessing international rights and obligations.[38]

The CIPEC agreement does not outrightly recognize or endow the association with international legal personality. But using the approach employed by the ICJ in the Reparations case, CIPEC appears to perform functions and enjoys rights which can only be explained through CIPEC having a measure of international legal personality. For example, it is capable of entering into an international agreement with states. It has in this regard entered into a headquarters agreement with the government of France. Under this agreement, CIPEC was accorded recognition as an international organisation enjoying all the privileges and benefits that accrued from this status.[39] Furthermore, CIPEC has in the territory of each member country, the legal capacity necessary for the exercise of its functions, and enjoys

---

38. Reparation for Injuries case, supra note 21.

39. See Report of the Executive directors on the activities of CIPEC (1970), CIPEC Document CO./97/71 at page 58.

privileges and immunities bestowed on it by the agreement on its status signed in Lusaka on 26th June 1974. In terms of status therefore, CIPEC is an autonomous, self regulating intergovernmental organization enjoying various competences on the international plane.

(iv) CIPEC's aims and objectives

Like most producers' associations, CIPEC has several objectives which it seeks to achieve. The most important of these include: coordination of commercial policies in order to stabilize copper prices and raise the real level of earnings by producers; obtaining better and more complete information regarding production and marketing of copper for its members; and to enhance the solidarity of the producers.

(a) Provisions dealing with coordination of copper marketing policies

The need for joint producer measures as far as production and marketing of copper is concerned was the main driving force for the establishment of CIPEC. At the first ministerial conference held in Lusaka in 1967, these sentiments were summed up by the then Chilean Minister of Mines, Mr. Alejandro Hales, who urged the world's major copper exporters to establish an intergovernmental council as a permanent body to implement joint measures of price safeguarding and marketing improvement. He further expressed the hope that the council would work out joint mechanisms to enable producing countries to take an active part in decisions affecting the copper markets.[40]

40. Financial Times, 2nd June 1967.

At the end of that conference, what emerged was an agreement between participating countries to establish CIPEC as a consultative body through which members could coordinate joint measures in relation to international copper markets.[41] The early years of CIPEC were therefore devoted to studies that would determine the appropriate measure that would facilitate the coordination of their commercial policies. Thus at its first Conference of Ministers held in Lima in November 1969, a number of resolutions to this effect were passed. One of these resolutions requested the Council to study the costs and pricing policies of the major copper exporting nations.[42]

At its second Ministerial Conference in Paris in November 1970, the right of copper-producing countries to a reasonable and just return on their investment in the industry was reaffirmed. The communique issued at the end of the meeting announced the setting up of a committee to study the most suitable measures to halt the decline in copper prices.

The 1974 Ministerial Conference held in Lusaka also called for coordinated action by producers of copper to combat the harmful role of speculators on the London Metal Exchange. Opening this meeting the Zambian Prime Minister, Mr. Mainza Chona had the following to say:

> "The time has come for speculators to be told that producers of copper have had enough. Everyday from Monday to Friday, the people of Zambia have to wait for the results of the second ring at the London

---

41. Financial Times, 2nd June 1967.
42. Times of Zambia, 29th November 1974.

> Metal Exchange to know how much their copper is worth on a particular day. They have been reduced to literally helpless spectators of events at this giant institution called the London Metal Exchange, where gambling takes place. We are helpless spectators because the people of this country, and indeed those of other copper producing countries, have no direct say in the levels of prices fixed. We therefore feel that the role of the speculator has continued to unduly influence the type of prices we get and the degree of fluctuations." 43

The call here was for the producer countries to form a concerted approach of combating the activities of speculators on the London Metal Exchange.

On all the above conferences, no concrete measures were adopted, and CIPEC achieved only what appears to be its main goal - a unanimous agreement to take cooperative action. The problem with this approach is that the coordinated policy approach does not always result in implementation of the policy decisions. This is particularly so because the CIPEC agreement itself does not provide for any implementation mechanisms for its coordinated policies. A number of policy resolutions passed by CIPEC therefore have gone unimplemented. For example, at its fifth ministerial conference, CIPEC member countries decided to completely co-ordinate the policy to be followed in the world copper market, and that this decision was to be implemented by means of mechanisms adapted to present circumstances.[44] Thus although the policy was agreed by the member countries, the decision remains unimplemented. It

---

43. Times of Zambia, 24th and 25th June 1974; and Financial Times of 25th June 1974.

44. See Times of Zambia, 26th June 1974.

would obviously have served the organization better if policy implementation mechanisms were incorporated in the CIPEC constitution. In this regard the agreement establishing the International Bauxite Association is a pertinent example. This agreement clearly spells out the various obligations which member states agree to observe. These include an obligation not only to coordinate policies but to harmonize the implementation of the decisions.[45] The effect of this kind of provision is to make uncooperative attitude by a member in the implementation of an agreed policy, a breach of the organisation's agreement. In the case of CIPEC however, no such provision is incorporated in its agreement. The result of this state of affairs is that the implementation of the organization's policy decisions is left to the determination of individual members. This often results in hollow policy decisions that are not implemented.

(b) Provisions relating to sharing of information, coordination of production and marketing of copper

The genesis of this objective of CIPEC seems to be the realization by producer countries that they are at a disadvantage in dealing with consuming countries and the various multinational corporations that are involved in the production and marketing of copper. This objective therefore aims at improving the members bargaining position vis-á-vis the importers by generating greater knowledge of their

---

45. Article IV of the International Bauxite Association agreement. For a full official text of the agreement, (1974) 13 International Legal Materials, pages 1245-1253.

industries' structure and markets. This objective is regarded by many other producers associations as vital to the success of any such association. For example, one of the first important projects undertaken by the Organisation of Petroleum Exporting Countries (OPEC) was a comprehensive study of the international petroleum market by an American consulting firm of Arthur D. Little.[46]

The importance of information gathering lies in the fact that it is not possible for producer countries to effectively bargain with consumer countries and multi-national corporations that control the markets of copper without their thorough understanding of all aspects of the industry. Moreover it is only through such understanding that producers can hope to intelligently intervene in the market. This explains the inclusion in the CIPEC agreement the objective of obtaining

> "for member countries better and more complete information and appropriate advice on the production and marketing of copper."47

In the first years of its existence, CIPEC devoted much of its work on information gathering. The focus on information gathering is reflected in the documents published by CIPEC between 1968 and 1972. Of the 83 documents produced by the governing board during this period 13 were study proposals, and of the 199 executive committee documents 50 were study proposals.[48] The studies so far

46. Al Otaiba, OPEC and the petroleum industry, (1975), Croom Helm at page 131. (1975)

47. Article 1(c), CIPEC agreement.

48. Mingst, "Cooperation or illusion: an examination of the intergovernmental Council of copper producing countries". (1976) 30 International Organization, 275.

undertaken in CIPEC involve the study of the copper markets, various copper mining legislations, working conditions in the mining industry, and investment prospects in the copper mining industry.[49]

(c) Enhancing members' solidarity

One of the most important goals of any producers' association is to try and coordinate its members' political policies. This goal aims at unifying the aspirations of member countries so that they would speak with one voice in various international fora. CIPEC also provides for this goal. The success of this goal within CIPEC has been remarkable. For example, their stand within the negotiations in UNCTAD regarding an international copper agreement, has been more or less unified since the beginning of negotiations. Differences do occur in matters of detail but the broad policies are presented jointly as a joint CIPEC position. One only hopes that this unified approach will soon be extended to other international fora.

(v) CIPEC's institutional structure

Producers' associations like CIPEC, constitute, in a general sense, the institutional response of developing countries to problems of commodity price stabilization. All such associations set or create institutional arrangements through which the collective will of the association would normally find expression. There is no uniformity as to the institutional arrangements but in practice some set out

49. Report of the Executive Directors on the activities of CIPEC, supra note 40.

three basic organs while others create only two. The number of organs varies in relation to the commodity in question and generally speaking associations of agricultural commodity producers tend to create two organs, while those for minerals tend to create three organs.

The CIPEC agreement makes provision for three principal organs consisting of a supreme policy-making organ, an executive organ, and a Secretariat.[50] This seems to be in keeping with arrangements employed by other producers' associations involved in minerals. For example the International Bauxite Association (IBA) provides under article VI of its agreement for the creation of three organs - the Council of Ministers, the Executive Board, and the Secretariat. Similar organs are found in the association of iron exporting countries, as well as in the Organization of Petroleum Exporting Countries (OPEC).

Originally, CIPEC had four organs, the conference of ministers, the Governing Board, the Executive Committee, and the secretariat - the Governing Board was composed of two high ranking officials from each member country, and was directly responsible to the Conference of Ministers for fostering technical and administrative cooperation among members. The Executive Committee was directly responsible to the Governing Board. This arrangement had created a measure of bureaucracy which did not augment properly with the need for efficiency in the organisation. The board was

---

50. Article 3, CIPEC agreement.

therefore scrapped in 1972 and its activities entrusted to the executive committee. The present CIPEC agreement establishes three organs, the conference of ministers, the executive committee, and a secretariat.

(a) The Conference of Ministers

The Conference of Ministers is the supreme policy making organ of CIPEC. The main representatives on this conference are the Ministers responsible for mining in their own respective countries. Like is the practice in other such association, the agreement requires the conference to meet once annually in ordinary sessions. These annual sessions represent an advantage in fostering the necessary habit of consultation and closer cooperation. Whenever circumstances dictate however, extraordinary sessions may be held at the request of not less than half of the members.

The ordinary sessions are held in alternate between the CIPEC headquarters and the member countries. For example, in 1982 the Conference met in Lima, Peru. In 1983 the Conference held its annual session in Paris while in 1984 the Conference met in Chile. In 1985 the conference is likely to meet in Paris.

The Conference of Ministers is open to observers, and regular observers include non-CIPEC copper exporters, and representatives of international organisations (usually UNCTAD, UNIDO, OPEC, IBA, The Tin Council, and Association of iron ore producers). Whenever the meeting takes place in a member country, the responsible regional economic commission, that is the Economic Commission for Africa, Economic Commission for Latin America, or the Economic Commission for Asia are also invited. In addition to these observers, a member country hosting the conference is free to invite a few more observers as it chooses. For example, at the fifth Ministerial Conference held in Lusaka in June 1974, the Zambian government invited as observers the three major copper consumers, Japan, the United States, and the United Kingdom. The invitation to these three major consumers appears to have been necessitated, at the time, by the need that existed for closer dialogue with consumers in view of the anticipated fourth UNCTAD session that was to take place in Nairobi in 1976. At the Nairobi conference, UNCTAD was to propose producer-consumer cooperation in commodities like copper, and by inviting major consumers at the Lusaka conference, the Conference of Ministers intended to show their willingness to work together with consuming nations. Again at the 1980 Conference of Ministers held in Lusaka, the three major consumers were invited. This invitation appears to have been a calculated move to show the keen interest copper producers have in working together with consumers in an attempt to stabilize the prices of copper, despite the breakdown in the producer-consumer talks under the United Nations Integrated Programme for Commodities.

The procedures followed in its meetings are in practice very informal and delegates rarely speak for the record. In fact the proceedings of this conference are never recorded and only a four to eight page final report is issued.[51] The advantage of this very informal practice is that it makes it very likely for delegates to pursuade each other and thereby reach agreement.

The chairmanship of the Conference, as is the practice in most international organisations, rotates among members changing hands once in every two years. The chairmanship is usually held by the host country and continues to be held by that country when the Conference meets at the headquarters in Paris, and changes hands again when another member hosts the conference.

The functions of the Conference are not explicitly stated in any one article of the CIPEC agreement. Article 5 however, spells out the broad functions of the conference as to put into effect the decisions made and coordination of policies concerning matters falling within CIPEC's competence. These broad functions are supplemented by certain specific provisions such as to consider and approve applications for membership of the association;[52] supervise activities of the Executive Committee;[53] appoint the Secretary General;[54] to consider and determine disputes among member countries concerning the interpretation and application of the agreement;[55] and amending or terminating of the agreement.[56]

---

51. Interview with Mr. P. Parkinson of the CIPEC Secretariat, Paris, December 1982.
52. Article 2(f) of the CIPEC agreement.
53. Ibid., article 7.
54. Ibid., article 14.
55. Ibid., article 31.
56. Ibid., article 29.

(b) The Executive Committee

The Executive Committee of CIPEC consists of permanent representatives of member countries. These permanent representatives are required to be nationals of the country they represent and should have held a responsible position in the implementation or formulation of their country's policies regarding the copper industry. This requirement reflects the nature of this organ's functions which are in the main to ensure or promote technical and administrative cooperation by formulating specific proposals to their respective countries for this purpose. The specific proposals that can be made by the Committee relate to the development of human resources in all areas relating to the production of copper, harmonization of the members' positions regarding copper production and marketing.

In practice however, each member country determines on its own whether to send a diplomat or technical expert to the Committee. Zambia usually sends a technical expert to this Committee. For example, the first Zambian representative on the Committee was Mr. James Mapona, a technical expert who is at present the Managing Director of the Zambia Industrial and Mining Company (ZIMCO). The second representative was Mr. Lamaswala who until the appointment was the managing director of the Zambia Metal Marketing Corporation (MEMACO). He has recently been appointed to the Bank of Zambia.

Countries represented on the Committee are divided into two groups depending on their membership status, that is whether they are full members or associate members. While both types of members are represented on the committee and actively participate in its deliberations, it is only the full members who have the right to vote.

Unlike in other such associations, the CIPEC agreement requires its Executive Committee to meet at least every fortnight. In other producers' associations such as the International Bauxite Association (IBA) these meetings are very limited. The IBA executive board is required to meet only about three times in a year.[57] In practice however, the CIPEC Executive Committee has never satisfied the requirement and has only been able to meet about six times annually.

The chairmanship of the Committee rotates among the full members once a year. Associate members are not entitled to chair the Committee. This is only logical particularly when one considers the fact that such members do not have voting rights in the Committee. To allow such members to chair the committee would amount to giving them power to influence decisions of the Committee even though the aim of denying them votes is not to allow them to exercise such influence.

Unlike in the Conference of Ministers, the meetings of the Committee are formal and representatives speak for the record. The reason for this appears to be in the technical nature of the subjects discussed in the Committee.

57. Article XI of the International Bauxite Association (IBA), and article 8 of the CIPEC agreement.

The formal nature of its proceedings has apparently not impaired decision making in this organ because of the close rapport which exist between the various members of the Committee.

Apart from formulating specific proposals for member countries, the Committee has one other important power - that of setting up technical committees to deal with certain specific issues in the copper industry.[58] Under these powers, the Executive Committee has set up a number of important committees which have come to play an important role in the structure of CIPEC. The committees that have so far been set are, the marketing policy committee, the technical sub-committee, the budget sub-committee, and a number of ad hoc committees.

(c) The Marketing Policy Committee

This committee was established in 1974 and was initially called the marketing and promotions committee. Because of the importance CIPEC attaches to problems of copper marketing, this was the only full fledged committee until very recently when the technical sub-committee was upgraded to a full committee.

The committee is composed of representatives of both full and associate members and each country decides on its own to send a diplomat or a marketing expert. In the case of Zambia, this responsibility has been delegated to the Metal Marketing Corporation (MEMACO) which has always sent

58. Article 12 of the CIPEC agreement.

a representative from its London office. In the past few years MEMACO services Limited in London has assigned the task of representing Zambia on this committee to its research manager.

The main function of this committee has been to conduct studies on matters relating to copper marketing and report to the executive committee. Occasionally, however, it has received direct requests from the Conference of Ministers to conduct certain specific market studies. In such instances the Committee has reported directly to the Conference. In exercising these functions, the Committee has no powers to make policy decisions but merely makes recommendations to either the Executive Committee or the conference of ministers, which may in turn translate their recommendations into policies.

Ordinarily this committee meets about four to five times in a year and its chairmanship rotates among the full members once every year.

(d) <u>The Technical Committee</u>

Originally this was established as a sub-committee of the marketing policy committee and was therefore directly responsible to that committee. Due to the increasing importance of issues dealt by it, it was decided in 1982 to elevate it to a full fledged committee in the organisation's structure. As a result of this change in status, the committee is now directly responsible to the Executive Committee, although on limited matters particularly those relating to marketing, it still reports to the Marketing Policy Committee.

The issue that necessitated the creation of a technical sub-committee related to the important question of copper specifications in the sales contracts. These specifications required copper delivered to consumers to conform to certain specifications set by the London Metal Exchange. This meant that any other specifications made by the producers could not be easily traded even though their production could have been more convenient and economical to the producers. CIPEC member countries felt that they were capable of producing higher quality grades than specified by the London Metal Exchange and which could earn them a higher price but were inhibited by the already set standards on the exchange. The technical sub-committee was therefore set to study ways and means of persuading the exchange to improve the copper specification terms. After many years, the sub-committee managed to reach agreement with the London Metal Exchange on improved specification arrangements in 1982. With the issue of copper grade specification settled, the sub-committee was assigned more functions and because of this increased responsibility, it was upgraded to a full committee.

The committee's new functions relate to all issues regarding tariff escalations on fabricated copper goods, copper promotion, better terms on maritime transport, and technical aspects of concentrates and blister copper.[59] The last issue in particular arose after Indonesia was admitted to CIPEC as full member. This country produces

59. See the report of the XVIIIth Conference of Ministers for CIPEC held in Lima, Peru in July 1982. See also CIPEC Quarterly Review, July-September 1982.

only blister copper and concentrates. The problems regarding blister and concentrate copper had not been tackled by CIPEC before Indonesia became a member because all the other full members produced refined copper. As a result the technical sub-committee had concentrated on specifications of refined copper and not blister and concentrates. It should be noted that there are no contracts traded on the London Metal Exchange relating to blister copper and concentrates. This has therefore become the most important issue the committee is studying. Preliminary recommendations on this issue were presented to the Conference of Ministers at their annual session held in Paris in July 1983.

The issue of tariff escalation on copper fabricated products is another important issue which has been assigned to this committee. The assignment of this issue to this committee, signifies a further development in the activities of CIPEC. In the first few years after its formation, CIPEC had devoted much of its time and resources to the issue of international copper market stabilization. It seems to have realized now that the goal of market stabilization is not in itself sufficient to ensure that development goals in its member countries are fulfilled more rapidly. The committee's task of studying tariff escalations, is therefore geared at finding ways and means for encouraging and enabling raw-material producers and exporters to become more significant processors of copper and therefore more significant exporters of manufactured copper products.

On the issue of concentrates and blister copper, an understanding of the issues involved may be gained through an explanation of some of the clauses contained in contracts entered into between producers and consumers of this type of copper. Usually the blister and concentrate contracts specify that the weighing and sampling of the metal be performed at the port of discharge and in accordance with certain specific procedures. The procedures specified usually reflect the normal practice in the business and as modified by the requirements of the port of discharge or the smelter. Generally speaking, the commercial settlement for concentrates will be based upon several metal elements such as copper, gold, silver, and several penalty elements, such as arsenic and mercury. In reaching this analysis the contract usually provides for each party to perform its own analysis on the concentrate received at the port of discharge or smelting plant. In order to allow for chemical differences between the laboratories, there is usually a clause in the contract accommodating these expected differences. For copper concentrates this difference will usually be 0.25 to 0.37% and is known as the splitting limit.
The problem with these contract clauses is that they put all the burden of losses incurred through shipment in terms of physical and chemical change on the producers even though these changes may not be as a result of their negligence.
As a result of these unfavourable contract terms which require the weighing and sampling to be done at the point of discharge or at the smelter, the producers of concentrate

have continued to incur a lot of losses in their real earnings due to physical and chemical changes that might take place in transit. The issue therefore is one of trying to improve the terms of these contracts. The task for studying the approach to be followed in this respect has been assigned to the Technical Committee. At its XVIth Conference of Ministers in July 1980, it was resolved that the Technical Committee should pursue this issue vigorously and if necessary jointly with other producers outside CIPEC.

By assigning the task of studying these important issues to one of its committees, CIPEC has shown a change in the line of thrust if one compares it with other producers' associations which have concentrated on the issue of balancing supply and demand of their respective commodities. CIPEC is now engaged in an increasingly systematic manner, in activities that will broaden and enhance the scope of action it may take to stabilize the copper market.

(e) The Budget sub-committee

Like all the other committees in CIPEC, this sub-committee is composed of representatives of all member countries. Its main function is to discuss and deal with all matters relating to the budget of the association. It holds its meetings twice every year, the first session being devoted to the examination of the association's accounts and the second session devoted to the discussion of the following year's budget. From time to time the sub-committee may not agree with the accounts and would seek more information or clarification from the Secretariat.

The proceedings in this sub-committee are very informal and nothing is recorded about its proceedings except a short final report containing its recommendations to the executive committee.

(f) The Secretariat

The CIPEC agreement sets out a corps of staff headed by a Secretary General charged generally with the responsibility of servicing the organisation. These members of staff at the Secretariat are regarded as international officials who are required not to receive any instructions from their governments.[60] Among the important functions of the Secretariat are the preparation of documents to be discussed by the Conference of Ministers and the Executive Committee, and preparation of draft resolutions for the Conference of Ministers which are usually adopted as they stand or with slight modifications.

Originally the Secretary General of CIPEC was not required to be a national of any member country. Indeed the first Secretary General was not a national of any member country. This was modified by the Conference of Ministers in a resolution of their 12th ordinary session held in Jarkata in 1977. The amendment to the CIPEC agreement effected as a result of that resolution, now requires the Secretary General to be a national of a member country.[61] Under the same amendment, the post is to be rotated among

60. Article 16 of the CIPEC agreement.

61. See supra note 55.

the full member countries in alphabetical order starting with a candidate from Chile. The term of office is two years with a possibility of reappointment.

(vi) Voting procedures in CIPEC

Unlike a number of other producers' associations, CIPEC has two categories of members - the full members and associate members. The distribution of votes in the organization is based on the nature of membership. The full members have equal voting rights, each member having only one vote, while associate members have no such rights. This inequality appears to be based on a fundamental principle that runs across all aspects of CIPEC. This principle is that countries that depend to a great extent on copper should be in a position to determine the marketing aspect of copper, while those not seriously dependent on copper exports can take advantage of the organisation but without determining the policies. This principle has necessitated two types of membership and a two-tier contribution system. The full members contribute equal amounts towards the cost of running the organisation, and the associate members pay half of what a full member pays.

(a) Decision making

Decisions and resolutions of the various CIPEC organs are reached through a system that classifies decisions into major and minor. Each organ before reaching a decision, must classify the issues into either major importance category or of a minor importance. This classification, is required to be made by a unanimous vote in the particular organ.

After the classification, major decisions are then required to be made by a unanimous vote of the full members in the organ. The requirement of unanimity clearly aims at receiving the support of all the full members before a decision is made. This unanimous support to a decision makes implementation much easier than if only a simple or qualified majority was obtained. It may be argued that the requirement of unanimity might make the taking of crucial decisions at critical times difficult. While there may be some merit to this argument, it is submitted that in an organization of only five full members it is important for purposes of implementation for each member to feel part and parcel of the decisions taken. An unfavourable attitude by one major exporter to a decision could easily frustrate the contents of the decision.

Minor decisions are reached on the basis of a two-thirds majority vote of all full members. Two-thirds majority of the present five full members works out to a figure of 3.3, which means that in effect minor decisions would require the support of at least four members before they can be passed.

The voting system in CIPEC clearly aims at fostering close cooperation by members in all the decisions. In fact the emphasis on close cooperation is reflected in the practice of the organization. Until 1982 only three minor issues were actually put to a vote, and all major decisions were passed without a vote.[62]

---

62. See *supra* note 52.

Decisions taken in the organisation are binding on all full members but are voluntary on the part of associate members. This provision is important particularly in relation to certain associate members, because each member is required to decide on its own the internal application of the decisions. Thus an associate member like Australia whose copper industry is in the hands of private entreprenuers, would find it difficult to conform to certain CIPEC decisions if they were made binding on it.

(b) Powers and functions of CIPEC organs

Like other elements of the constitution of any international organisation, the relevant provisions on powers and functions have to stand the test of

> "the unknown, the unforeseen, and indeed the unforseeable." 63

In CIPEC the unforeseen is likely to arise in the case of admission to membership, delimitation of functions between the various organs, compliance with rules of procedure, and an organ exceeding its constitutional powers.

Article 2(f) of the CIPEC agreement provides that admission of a new member shall take place in accordance with the terms of the agreement and with the approval of the Ministers of the member countries. The problem which might arise in this regard is whether admission could be effected without the approval of the Ministers. This problem is made even more likely by the fact that the agreement does not specify the organ that is to effect admission but merely requires such admission to be effected only after the approval of the ministers of member countries has

---

63. See Sir Percy Spender's separate opinion in The Certain Expenses of the United Nations Case [1962] ICJ Reports, 185.

been obtained. It is difficult to believe that the agreement left this task to the Conference of Ministers because if this is the case then prior approval of the various ministers who compose the Conference would seem to be unnecessary. If on the other hand admission was to be effected by the Executive Committee then the prior approval of the Ministers would seem to make sense. The uncertainty might cause problems in future say in an event where an applicant country is refused admission and challenges the decision on the ground that a particular organ did not have the power to effect or refuse admission.

The problem of delimitation of functions and powers between organs and the interpretation given, in that connection, to express provisions in a constituent instrument, is illustrated by two advisory opinions of the International Court of Justice. One of the opinions was delivered in 1950. The issue before the court was one concerning the distribution of powers between the United Nations General Assembly and the Security Council. On the face of it the problem was simple; the charter of the United Nations provides for admission to membership to be effected by a decision of the General Assembly upon recommendation of the Security Council. The question the court was asked to answer was whether in view of this provision, the General Assembly could admit a country to membership when the Security Council had not made a recommendation by reason of a candidate's failure to obtain the requisite majority or of the negative vote of a permanent member.[64] The court was of the view that,

> "to hold that the General Assembly has power to admit a state to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the charter."

This literal interpretation if applied to CIPEC, would seem to suggest that no admission to membership can be effected without the approval of the Ministers of the member countries. If this interpretation is correct, it is hard to envisage the Conference of Ministers approving the admission and at the same time effecting admission. It is therefore, submitted that admission should be effected by an organ other than the Conference of Ministers. The most likely organ to do this in the CIPEC structure is the executive committee. But since the CIPEC agreement on this issue is vague, one has to merely speculate on what might happen in the event of a dispute arising regarding competence of one of one of CIPEC's organs to effect admission.

Another potential area of conflict in any organisation such as CIPEC relates to situations when an organ is alleged to have exceeded its powers provided for in its constitution. In one case in which the International Court of Justice was asked to give an advisory opinion on whether the General Assembly of the United Nations had acted ultra vires the charter, the court observed that when an organ of an organization takes action which warrants the assertion that it

---

64. Competence of the General Assembly for the Admission of a State to the United Nations, [1950] ICJ Reports, 9.

was appropriate for the fulfillment of one of the stated purposes, the presumption ought to be that such action is not ultra vires the organisation.[65] This view was affirmed in the International Court of Justice's advisory opinion concerning the legal consequences for states of the continued presence of South Africa in Namibia. In that case, the court expressed the view that,

> "a resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure and is declared by its President to have been so passed, must be presumed to have been validly adopted."[66]

Since CIPEC is an international organization, it seems valid to assume that the observations made in the two cases above apply to it. If this is the case, then the starting premis is that the resolutions of CIPEC which are validly passed ought to be presumed to be valid and not ultra vires the CIPEC constitution. This however, is not to say that all resolutions and decisions of the various organs in CIPEC will be valid. Like all other international organizations, it possesses the capacity to commit ultra vires acts. This view finds support in the fact that the functions and powers of the organs of an organisation like CIPEC, as well as the procedures to be applied in the exercise of these functions are usually laid down in the constitution of the organization. It is therefore perfectly possible that in the fulfillment of their objectives, an organ may authorize activities which are not expressly or indeed

---

65. <u>Certain Expenses of the United Nations</u>, [1962] ICJ Reports 168

66. [1971] ICJ Reports, 22.

impliedly authorized in their constitutions.[67] In these circumstances, a question may arise as to whether certain decisions are unconstitutional.

In the case of CIPEC, if an issue regarding the constitutionality of the acts of one of its organs arose, it would not find an answer in the constitution of the organisation. The CIPEC agreement does not contain a provision on this issue. Furthermore, even if a clear case of an ultra vires action by an organ of CIPEC was to be established, there would still remain the problem of what remedy could be provided. As judge Morelli observed in his separate opinion in the certain expenses case,

> "in the case of acts of international organisations, and in particular the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations."[68]

By implication this means that ultra vires activities of organs of an international organisation like CIPEC cannot be declared void. Since the CIPEC agreement does not provide a remedy in such circumstances, it would seem that the party aggrieved would only have to depend on the general remedy provided in the agreement, that of withdrawal from the organization. This, it seems is an unsatisfactory approach to the problem of ultra vires activities. A more

---

67. See dissenting opinion of Sir Gerald Fitzmaurice, <u>Consequences for states of the continued presence of South Africa in South West Africa (Namibia)</u>, [1971] ICJ Reports, 8 at page 280.

68. See <u>supra</u> note 65.

satisfactory solution would be one in which a procedure is set out specifically to deal with this problem. Such a procedure expressly be embodied in the CIPEC agreement.

Non compliance with the procedural rules is another potential area of conflict in an organization like CIPEC. The CIPEC agreement does provide a number of procedural rules regarding various issues. For example, it provides that major decisions of its organs have to be made when a unanimous vote has been attained. If however, an organ of CIPEC adopts a decision on a major issue in a manner not consistent with this procedure, a question may arise as to whether such a decision is illegal or unconstitutional. Similarly, the agreement empowers the various organs to determine their own procedures in certain instances. If such an organ determines its own procedure, and decides subsequently not to apply the procedure, an issue of the constitutionality of its act may arise. If such an issue arises and it is established that the act was ultra vires the CIPEC agreement, the issue would be reduced to one of determining what remedies are available. Regrettably, the CIPEC agreement does not provide any express remedy except perhaps to allow a member aggrieved to withdraw. Driving member countries to withdrawal does not seem to be the best solution to this problem. A more acceptable solution would be for the CIPEC agreement providing for a mechanism that would remedy the ultra vires act.

The discussion of these problems might sound speculative in view of the willingness of CIPEC member countries to use its organs to discuss and solve its problems, but the likelihood of these problems arising seriously cannot completely be overlooked. It is to tackle these unforeseen circumstances that CIPEC would do well to introduce new provisions in its agreement.

(vii) Dispute settlement in CIPEC

Disputes most likely to occur in CIPEC conform to two patterns - disputes between member countries, and disputes between the organization and the members. In both cases the disputes are likely to relate to the application of the organization's agreement.

There is no doubt that the most important motivation for any country joining CIPEC is the importance of copper to such a country's economic well-being and the perceived capacity of the organization to enhance the interests of these countries as far as copper production and marekting is concerned. But since the interests of all CIPEC members as far as copper is concerned cannot reasonably be expected to be the same, the potential for conflict between the members of the organization is considerable. The need for adequate constitutional provisions providing for conflict resolution procedures is at the very heart of a successful CIPEC.

The significant feature of the constitutional provisions in CIPEC, like those in many other producers' associations is the internalized procedures for dispute settlement.[69] Only two producers' associations provide for externalized

69. Article 13(2) of the Groundnut Council, and Article 17 of the Tea Promotion Association.

dispute settlement procedures. The African groundnut council provides for disputes to be referred to the organization of African unity conciliation and arbitration commission, while the tea promotion association provides recourse to the international court of justice.

Article 31 of the CIPEC agreement deals with dispute settlement and requires all disputes concerning the interpretation or application of the agreement to be referred to the conference of ministers for decision or to be resolved by the parties to the dispute in a manner agreed between themselves. This approach has been followed in a number of other international organizations such as the international Bauxite Association, the International Monetary Fund, the International Finance Corporation (IFC), and the International Development Association (IDA).[70]

The internalized approach to dispute settlement reflects the nature of the most likely disputes to arise in an organization like CIPEC. Since CIPEC is an organisation that aims mainly at harmonizing the production and marekting policies of copper producing countries, the disputes that are most likely to arise will involve policy issues and their implementation. Policy disputes by their very nature are non-justiciable.[71] Because of this non-justiciable nature of policy decisions, policy makers tend to conceive themselves as better suited to settle the disputes than

70. See for example, article VIII of the IBA agreement; article XVIII of the IMF agreement; article VIII of the International Finance Corporation (IFC); and article XIII of International Development Association (IDA).

71. Hexner, "Interpretation by public international organisations of their basic documents", (1979), 73 A.J.I.L. 341.

judicial officers who are unlikely to appreciate the policy implications of their decisions.

The difficulty with the internalized dispute settlement procedure is that the policy makers may not be in a position to appreciate the relevant legal principles that might be interwined with the policy issues. To tackle this problem, a number of producers' associations have established procedures through which the organ responsible for dispute settlement would seek advise from legal experts. For example, the constitution of the Union of Banana Exporting Countries empowers the Banana Council, which is the organ responsible for dispute settlement, to seek the opinion of an advisory commission before reaching decisions.[72] This advisory commission is established within the organization, as a subordinate organ composed of legal experts. By providing such a procedure an organization would be said to be meeting the demands of critics of the internalized dispute settlement procedures. There is certainly justification in this reasoning because if the deficiency of the internalized system is its lack of competent men to tackle the legal issues, then providing for a consultation or advisory procedure with a subordinate legal organ, the problem would appear to be solved.

The CIPEC agreement provides for the internalized dispute settlement procedure through its Council. The Council being the supreme policy maker in the organization, would seem to be suited to deal with the disputes which are likely

---

72. Article 34 of the Constitution of the Union of banana exporting countries.

to be of a political nature. But as has already been conceeded, the decisions of such a policy making body might need to be informed by legal experts about certain legal principles. Unlike the Union of Banana Exporting Countries, CIPEC does not provide for this advisory organ and procedure. The natural result of this deficiency would seem to be that parties to a dispute who decide to use this procedure would be entrusting the solution of the problem to a policy organ and a policy solution. This might result in unsatisfactory settlement of disputes particularly when the dispute involves the interpretation of certain legal principles in the constitution. It should be noted that the organ responsible for dispute settlement in CIPEC is the Conference of Ministers which is composed of ministers responsible for the mining industry in the member countries. It is unlikely that these men would be legal experts.

This deficiency appears to be compensated by an alternate dispute settlement procedure provided for in the CIPEC agreement. Under this procedure, member countries, parties to a dispute may choose to settle their dispute in a manner agreed upon among themselves. This provision appears to be broad enough to allow for the setting of an ad hoc advisory body of legal experts to provide expertise in the interpretation of the legal issues involved.

(a) Competence of the Conference of Ministers in dispute settlement

As mentioned earlier on, the CIPEC agreement confers the competence on dispute settlement, to the Conference of

Ministers. The problem, however, is whether the conference can exercise this competence at any time or only when a case has been referred to it.

The difficulties which this issue may raise has been appreciated by a number of producers' associations which have included express provisions in their constitutions regarding the matter. For example, the constitution of the African Groundnut Council provides that,

> "Any dispute concerning the interpretation or application of the agreement shall, at the request of any country party to the dispute, be referred to the Council for a decision."[73]

The CIPEC agreement on the other hand provides for all disputes to be either referred to the Conference of Ministers or settled in a manner agreed by the parties. This provision, clearly does not expressly specify where the power of reference resides. In other words, it does not specify who should refer the dispute to the conference. Due to this lack of specificity, it may be reasonable to assume that any member country in the organization or indeed any other organ in the organization may refer a dispute between two members to the conference. If this is a correct interpretation, it would appear that the CIPEC agreement provides for some sort of a compulsory dispute settlement procedure. Such a procedure would seem to be suitable for an association which depends very much on the good relations between its members.

---

73. See Article 13 of the African groundnuts council.

(b) Appeal procedures

A number of producers' associations provide for appeal procedures from the decisions of the policy making organs. Most of these provide for compulsory third party adjudication in the event of the dispute settlement organ of the organization failing to resolve the dispute. The African Ground nut Council provides for reference of a dispute to the commission of mediation, concilliation and arbitration of the Organisation of African Unity (OAU).[74]

The language in article 31 of the CIPEC agreement appears to be sufficiently wide to allow for third party adjudication where the parties concerned agree to do so. Where this appeal procedure is exercised in relations to the interpretation and application of the instrument constituting the organisation, then a number of difficult issues may arise. For example, if the third party to whom the issue has been referred renders its decision, the decision may be based on interests not quite the same with those of other members of the organization. In such a situation difficulties may arise as to whether the other members of the organization would be obliged to conform to such a decision. Similarly, the third party requested to settle the dispute may have views not consistent with the organization's objectives or may simply not be well versed with such objectives, and may therefore pronounce decisions that may prove inimical to the interests of the organization.

---

74. Ibid., Article 14.

(c) Finality of the decision of the conference

The constitution of CIPEC is silent on the issue of the finality and conclusiveness of the determination of the conference of Ministers regarding a dispute between members. If finality merely refers to the absence of a right of appeal to a higher authority rather than permanence,[75] it would appear that where no provision is made then the presumption would be that a party dissatisfied with a decision would be entitled to raise it again.

This view seems to find a measure of support in the practice of some international organizations. For example, the International Bauxite Association's constitution is silent on the issue of the finality of the decisions of the Council of Ministers which is the organ charged with the responsibility of dispute settlement.[76] But at its first session in 1974, the Council of Ministers in interpreting article XIX(1) of the agreement decided that contributions to the association's budget are to be calculated in the currency of the host country (Jamaica) but paid in United States dollars.[77] Although this decision was accepted by all members, at its fourth session a few years later, the Council reversed itself and decided that contributions were now to be calculated and paid in United States dollars.[78]

---

75. See Gold, Interpretation by the fund. IMF pamphlets series No.11, 1968.

76. Article VIII para 2(e) of the IBA agreement.

77. Report of the Council of Ministers on the work of its first session, unnumbered.

78. Report on the Council of Ministers on the work of its fourth session. IBA/COM./IV/17/77.

The assumption therefore is that if a member of CIPEC is dissatisfied with the decision of the conference in relation to a dispute it is involved in, the party is entitled to raise the issue again and again. But obviously there is a limit to the number of times a member can raise the same issue. If after many times a member is still dissatisfied, then it would seem that such a member's only recourse would be to withdraw from the organization.

VI. CIPEC's activities since its creation

The main activities of CIPEC since its inception has centred on the coordination of members political and commercial policies, and the issue of copper market stabilization. The approach followed by the organization has been to tackle the problems in a very general way. This perhaps reflects the nature of the organization itself. Unlike commodity organizations such as the International Tin Council which exists to administer detailed agreements, CIPEC is an intergovernmental organization of an advisory nature and without adequate powers to tackle for example the issue of price fluctuations. In view of this inherent deficiency, CIPEC like all other producers' associations, pursues the problems of copper marketing through reorganizing of the producers' policies.

(i) Coordination of political and commercial policies

Since its establishment, CIPEC's main concern has been the coordination of the political and commercial policies of its members with a view of stabilizing the prices of copper at levels that are remunerative in real terms to producers. In this regard, CIPEC has sought to achieve first and foremost the cooperation of all major copper exporting countries in harmonizing the producers' position.

It is for this reason that CIPEC has pursued its efforts to persuade other copper producing countries still outside the organisation to join it. Indonesia, Australia, Mauritania, and Papua New Guinea have already joined the organization. Other exporters such as Mexico, Iran, and the Philippines have been invited to join the organization and CIPEC merely awaits the response from them.[79]

This is an important aspect of CIPEC's activities because experience has shown that only when major exporters can harmonize their policies and present a joint basis for negotiation is there a real possibility for the problems of commodity marketing to be solved. The key to any international solution to the problems of copper marketing, therefore, lies with the solidarity of the producers.

CIPEC has so far managed to develop a mutual understanding between members, and has developed a practice of having a concerted approach to many issues of importance in relation to copper marketing. It is in the field of marketing policy and techniques where this understanding is most developed. In this regard, the organization has conducted a number of studies which have enabled the various

---

79. Interview with Mr. P. Parkinson of the CIPEC Secretariat conducted by the writer in December 1982.

marketing corporations of the member countries to seek common terms in their marketing contracts and avoid a situation where they were played against one another by sophisticated consumers. It should be noted that as a result of these studies, CIPEC member countries have been able to improve their terms in their sales contracts particularly by insisting on premiums. These premiums involve about six cents per pound and have greatly increased the earnings of CIPEC members.

(ii) Price stabilization through CIPEC

The main objective of CIPEC has been copper price and earnings stabilization. Member countries have over the years had several meetings aimed at devising a support system for the world market price of copper. Unlike the commodity agreement approach, CIPEC has taken the view that concerted supply policies by the producers alone is likely to influence the copper prices. Indeed simulations worked out by economists have indicated that by withholding at least 20% of CIPEC members' production, the producers may achieve a threefold rise in the prices.[80]

It is important therefore, for CIPEC to work a strategy that would win the sympathy of as many producers' as possible and persuade them to cut production. It is obviously difficult for CIPEC to expect sympathy from some producers outside CIPEC whose industries are privately

80. Joseph Wyman, "Perspective on Copper", Reynold's Research Associates, February 24, 1975. Mimeo.

controlled and therefore any production cuts would not automatically be expected to be enforced. Since however, the majority of the CIPEC countries have their copper industries in the hands of the governments, a concerted production cut policy is likely to succeed within the organization but if only the members are whole heartedly committed to the policy.

The actual steps taken by CIPEC in this regard were a 10% cut in exports agreed in December 1974, coupled with a commitment by members not to increase their stocks of refined copper. Although the cutback proved inadequate to influence the market, CIPEC had made a major score. It had demonstrated its capability to utilize its agreement to harmonize the members' policies. This more than anything else is at the core of the CIPEC agreement.

In 1975, CIPEC again demonstrated a concerted approach by agreeing on a production cut of 15%. But again the cuts proved inadequate to achieve the desired goal of price stabilization. But even if the production cut agreed had been substantial, a number of problems could have arisen due to the advisory nature of the organization itself. Among the problems that immediately come to mind is the difficulty of ensuring compliance by all the members. Internal problems in a member country both social and economic may force a member not to abide to the agreed production cuts particularly where the agreement provides no sanctions for non compliance. Similarly, lack of commitment by a member may result in that member taking advantage of other members by increasing production when other members are committed to the agreed production cuts. This later problem has actually been experienced in relation to Papua New Guinea. The Bourganville mine in this country has very rich by-products such as gold. Thus even when prices of copper are low this mine may compensate its losses through the sales of the by-product. And if the prices of gold was high as it was a few years ago, a policy of production cut in CIPEC would not appeal very much to this mine.

Although therefore, the CIPEC agreement provides for means of harmonizing the policies of members regarding production cuts and other policies aimed at copper price stabilization, the agreement does not provide means for implementation. For example, one major hurdle faced by CIPEC in stabilizing prices is the question of financing the stock pile in the event of the agreed production cut. This problem is made even more acute because unlike producer countries in commodity councils such as the Tin Council, CIPEC members have no access to the International Monetary Fund buffer stock financing facility. This facility is limited to organizations of consumers and producers. The failure of the CIPEC Agreement to provide for this problem has proved a threat to the survival of CIPEC.

The above problems have bogged down the issue of price stabilization in CIPEC and has forced the organization in recent years to concentrate its efforts on the development of dialogue with consumers under the United Nations Integrated Programme for Commodities.

Another set back to CIPEC's price stabilization measures has been the lack of agreement between its members on the appropriate meaures to be taken. As early as 1972, for example, CIPEC members had debated on the possibility of introducing a minimum price for copper. At the Conference of Ministers held in Lima, Peru it was agreed that a minimum price should be introduced under which producers in CIPEC would withhold the sale of copper. More recently it has been agreed that there be a floor price but so far the members have been unable to agree on its implementation.

VII. Conclusion

Like many commodity producers, copper producing developing countries have lost their faith in consumer-producer commodity agreements as a tool for price stabilization. This loss of faith has been a result of the very limited results that have been attained through this method. Indeed in the case of copper, the prospects for a successful conclusion of such an agreement are no more closer than they were in 1976 when negotiations between producers and consumers began. The prospects for the stabilization of the copper markets through this method appear, therefore, to be somewhat limited.

A number of producing countries in developing countries have in recent years come to accept the fact that better results may accrue to them through some form of collusive action by the producers. This realisation resulted in a number of producers' associations being created, and in the case of copper, CIPEC was created in 1967. The CIPEC agreement creates a consultative organization for producers of copper. The membership of the organization appears to be limited to producers in countries that have their copper industries controlled mainly by the governments. This is evident from the admission to membership requirements in the agreement. Countries not meeting this criteria of full membership are admitted as associate members.

Maximization of export revenue and stabilization of copper markets are two of the important aims of CIPEC. To achieve these objectives, the CIPEC agreement does not directly provide for a mechanism such as supply management but provides a forum under which member countries could work out the necessary measures as need arises. This lack of a predetermined mechanism to deal with the copper market instability has resulted in CIPEC failing at crucial times to reach decisions as to the mechanism most suitable to deal with the problem. This consultative approach therefore, merely enables member countries harmonize their marketing policies and techniqes but has proved inadequate as far as price stabilization is concerned.

For a successful consultative approach, the organization so created must embrace as many producers as possible, and be able to agree on actions or implementation techniques at the crucial times. The CIPEC agreement seems to fail in all these two aspects although efforts have been made in an attempt to extend its membership to as many producers as possible. This failure raises the problem of the efficacy of the whole consultative approach taken by CIPEC. It is submitted that this approach is inadequate to solve the problem of the copper price instability. To succeed in this goal, a consultative organization such as CIPEC needs additional supportive measures. These additional measures could either be in the form of compensatory financing schemes or through individual CIPEC members being involved in regional marketing groups. The idea of compensatory financing schemes is discussed in Chapters 7 and 8, and the regional approach to the marketing of Zambian copper is discussed in Chapter 9.

Although the CIPEC agreement has failed toprovide an effective machinery for copper price stabilization, it has served as a useful source of the understanding of the international copper markets, for its members. It has also helped to foster close cooperation between producers in developing countries. In this regard CIPEC has not been a useless venture but a real force that merely needs additional measures to be able to control the prices of copper.

CHAPTER SEVEN

COMPENSATORY FINANCING APPROACH: THE IMF SCHEME

I. The aims of compensatory financing schemes

Compensatory financing schemes are not designed to tackle the problems of price fluctuations directly but to approach the problem indirectly. They approach the problem by way of tackling the effect such fluctuations have on the export earnings of the producer country.

As pointed out in Chapter One, copper price fluctuations on the LME have usually resulted in fluctuations in the export earnings of Zambia. Compensatory financing schemes would therefore aim at providing Zambia with financial assistance to alleviate hardships resulting from fluctuations in its earnings from copper.

These schemes are therefore a form of aid and deliberately seek to transfer resources from the developed countries to developing countries dependent on exports of commodities that experience price instability on international markets. It should be emphasized that such schemes do not aim at solving the problem at the source of the price instability.

This being the case, the schemes can only be of help to a country like Zambia only in the short term. This indirect approach to tackling problems of price fluctuations does have its advantages that cannot totally be ignored. One of the main advantages is that they do provide financial resources that would help a country whose export commodity experiences price fluctuations to meet its projected budget requirements.

To be effective in meeting this goal therefore, such schemes should have adequate financial resources, the rules and procedures for the release of such funds should not be stringent, and the repayment procedures should be flexible and liberal.

In the case of Zambian copper, there are two schemes that exist at the moment and to which Zambia may turn to in the event of copper prices fluctuating, that operating under the International Monetary Fund hereafter referred to as the IMF scheme, and one operating under the Lomé Convention. This chapter attempts to analyse the IMF scheme and its role in tackling the export earnings instability experienced by Zambia in the last decade as a result of persistent copper price fluctuations on the London Metal Exchange.

II. The use of the IMF resources by its member countries

Since its inception, the IMF has accepted shortfalls in the export receipts of commodity producing member countries as part of the justification for drawing under its ordinary financing facilities. Ordinary financing facilities of the IMF are made up of two elements. The first element is the reserve tranche which represents 25 per cent of each member's quota and since the early 1950s has de facto been automatically available to all the members. The second element is the credit tranche which is divided into four equal sub-tranches, access to each of these becoming progressively less easy and subject to more rigid conditions.

The IMF's[1] willingness to regard shortfalls in export

1. From this point on the International Monetary Fund will be referred to simply as the Fund.

receipts from commodities as a justification for a member to draw from its resources is clearly consistent with its declared objectives. The most relevant objective of the Fund is,

> "to give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."

and

> "in accordance with the above to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members."[2]

It is clear from these objectives that the Fund is basically intended to be among other things, a short-term balance of payments stabilization institution. It therefore has the responsibility of providing at least temporary assistance in financing those member countries that encounter balance of payments problems resulting from circumstances beyond their control such as fluctuations in their export commodities.

This interpretation of Article I of the Fund's Articles of Agreement was confirmed by a decision of the Executive Directors who expressed the view that the Fund's purpose was that of giving temporary assistance in financing balance of payments deficits on current account for monetary stabilization operations.[3] This interpretation read together with Article V paragraph c of the Fund's Articles of Agreement ties any use of its resources to the purpose and objectives of the Fund. Article V (c) provides that:

---

2. Article I para V and VI of the IMF's articles of agreement.

3. IMF Executive Directors decision 71-2, in the Executive Directors decisions, third issue, Washington, 1965, at p.54.

"A member's use of the resources of the Fund shall be in accordance with the purposes of the Fund. The Fund shall adopt policies on the use of its resources that will assist members to solve their balance of payments problems in a manner consistent with the purposes of the Fund and that will establish adequate safeguards for the temporary use of its resources."

It would seem clear that this Article requires that any use of the Fund resources must first of all be shown to be in conformity with the purposes of the Fund. Secondly, it must be shown that such use is in conformity with the policy of the Fund which conforms to its purposes. And finally that adequate safeguards are provided for the use of such resources.

(i) Conformity with the Fund's purposes

The first requirement that has to be satisfied before any use of the Fund's resources can be made is that the intended use has to be shown to conform to the purposes of the organization. To this end, while the Fund considers it its duty to provide financial assistance to members, it has always insisted that financial assistance would only be provided when a member's balance of payments is temporarily in disequilibrium.[4] It is for this reason that the Fund requires that a member's request to use the resources be examined by the Fund in order to determine whether such funds would be used in conformity with the general purposes of the Fund. To ensure that any use of its resources conforms to its purposes, the Fund in practice requires a member seeking the funds to provide the Fund with a statement of the policies that it would employ. It is from

4. See for example, Report of the first ten years of IMF, (1956), which views inflation and not lack of capital as the main impediment to development.

such statements that the Fund can be able to determine whether Fund resources will be used for purposes specified in the article of agreement. The Fund's attitude towards requests by members for finance has always turned on whether the problem to be met is of a temporary nature, and whether the policies the member will pursue will be adequate to overcome the problem within such period - the policies above all determine the Fund's attitude.[10] The members' policies in the case of a stand-by arrangements for example, are in practice contained in a Letter of Intent which usually is drafted jointly by the IMF and the member concerned[11] The letter of intent sets out the program of general and specific policies which the government will put into operation after the funds have been procured , and it is this which is examined by the Fund which grants the funds only when it is satisfied that the funds would be used in conformity with the purposes of the Fund.

There is one important question that arises in relation to such a Letter of Intent. Does such a letter create an obligation on a member using the resources to adhere to the policies it has specified and upon which the Fund relied on providing resources? The answer to this question will depend on whether the letter of intent can be regarded as an agreement between the member country and the Fund. If it is to be regarded as an international agreement, then

5. IMF, Executive Board decision no. 102-(52/11) of February 13th, 1952.

6. The letter of intent is usually signed by the Minister of Finance and/or the Governor of the Central Bank indicating why the country seeks the funds and outlines the programme it proposes to follow in an attempt to solve its balance of payments problem.

the member would be obligated to follow the policies declared in its Letter of Intent. In this case failure of the member to follow the policies would therefore be construed as a breach of its obligations. The policy of the IMF that requires suspension or interruption of the right to make purchases whenever a performance criteria was not observed, does create the impression that the letter of intent does create an obligation on a member country to adhere to the policies it states in the Letter of Intent - failure to do so being met by the sanction of interruption of right to make purchases. This impression however, seems to be diminished when one takes into consideration other relevant factors. For example, it is a common understanding in law that the existence of an agreement ultimately depends on the intention of the parties. An understanding between two parties therefore, may be expressed in legal language but if all other relevant circumstances indicate that the parties did not intend a legally binding agreement, then such an understanding would not rightly be classified as an agreement. By the same token, an informal understanding may be an agreement if the intention of the parties so dictates. If therefore the parties have given an appearance of an agreement to their understanding, it may be presumed that the parties intended an agreement.

There is nothing in the letters of intent as well as other documents relating to a member's use of the Fund resources which suggests that they could amount to international agreements. Although a member country subscribes its signature to documents such as the letter of intent, the Fund does not do so and in fact executes no document. Furthermore, none of the letters of intent and documents relating to the use of Fund resources has ever been registered under Article 102 of the United Nations charter which requires every treaty and every international agreement entered into by any member of the United Nations to be registered with the Secretariat and published by it.[7] Furthermore, the domestic practice of members is consistent with this reasoning because members do not submit such arrangements to domestic legislative procedures that are usually followed in relation to international agreements and treaties.

The fact that arrangements between the Fund and its members regarding the use of its resources are not international agreements and therefore do not create obligations on the members involved to abide by them, does not mean that the Fund resources could be used in a manner inconsistent with the purposes of the Fund. This is because the Fund's articles of agreement provide a sanction mechanism which can be used to limit a member's future use of its resources or even declaring such a member ineligible to use the resources in future.[8]

---

7. It should be noted that membership in the IMF is open only to members of the United Nations, and any agreement between a member and the Fund would be required to conform to Article 102 of the UN charter.

8. See article V, section 5 of the Fund's Articles of Agreement.

(ii) Fund policies for the use of its resources

There are a number of facilities under which a member may draw on the resources of the Fund. These can be divided into three categories, the reserve tranche, the credit tranches, and the special facilities. All these facilities have been set up not directly by the articles of agreement but by the policy decisions of the policy making organs of the Fund. The power to make policies relating to the use of the resources of the Fund by the members is contained in article V section 3 paragraph c which states that,

> "A member's use of the resources of the Fund shall be in accordance with the purposes of the Fund. The Fund shall adopt policies on the use of its resources that will assist members to solve their balance of payments problems in a manner consistent with the purposes of the Fund and that will establish adequate safeguards for the temporary use of its resources."

The Fund's power under the above article has one important dimension, that any policy made by the Fund regarding the use of its resources must be consistent with the overall purposes of the organization, the most important of which is to help member countries in their short term balance of payments problem.

Pursuant to article V section 3(c), the Fund has over the years made a number of policy decisions regarding the use of its resources by member countries. Two categories of facilities have so far been created. These are the so called normal and special facilities. The normal facilities comprise of ordinary drawings under the tranche policies, stand-by arrangements, and the special drawing rights facility. These facilities are intended for use by those member countries facing balance of payments problems resulting from the overall bad performance by their economies. The special facilities on the other hand, were created for the use of those members facing balance of payments problems resulting from special and specific problems.

At present there are three special facilities in operation, the Buffer Stock Financing Facility established in 1969 to finance member contributions to eligible international commodity buffer stocks; the Compensatory Financing Facility established in 1963 to alleviate members' balance of payments problems caused by shortfalls in export receipts;[9] and the Extended Facility created by a decision of the Executive Directors in 1974 to provide medium term assistance to members with imbalances related to structural maladjustments.[10] Our attention will later on in the chapter, be focused on the Compensatory Financing Facility which is of considerable interest to copper producing countries as well as producers of other commodities. For the time being however, it should be mentioned that all the facilities so far created by the Fund do conform to its general purposes in the sense that they are all to be used for purposes of alleviating member countries' short

9. IMF, Executive Directors decision no. 1477(63/8) as amended by Executive Directors decision no. 2192 (66/81) of September 20, 1966.

10. See IMF press release no. 74/43 of September 15, 1974.

term balance of payments problems. Decisions regarding these policies all require that a member shows that it has a balance of payments problem before it can ~~be able~~ to draw on any of the facilities. Because the resources can be made available only in order to help correct an imbalance in members' balance of payments, all the facilities do require that the use of the resources be of a temporary nature.[11] The logical result of all this is that a country's economic difficulties that do not translate themselves into a balance of payments problem cannot be dealt with through these facilities. Problems facing copper on the world markets do eventually translate themselves into Zambia's balance of payments problems making these Fund facilities of particular interest to that country.

(iii) Conditionality in the use of Fund resources

One of the most widely debated issues in the IMF relates to conditions attached to the use of its resources by member countries. Reference to these conditions is made in article 3 section 3 of the Fund's Articles of Agreement of which paragraph (a) states inter alia that:

> "a member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:
>
> (i) The member desiring to purchase the currency represents that it is presently needed for making in that currency payments which are consistent with the provisions of this agreement;

---

11. IMF, Decision no.102-(52/11) of February 13, 1952 limiting the use of ordinary drawings to between three and five years.

(ii) The Fund has not given notice under article VII section 3, that its holdings of the currency desired have become scarce

(iii) The proposed purchase would be a gold tranche purchase or would not cause the Fund's holdings of the purchasing member's currency to increase by more than twenty-five percent of its quota during the period of twelve months ending on the date of the purchase or to exceed two hundred percent of its quota;

(iv) The Fund has not previously declared under section 5 of this article, article IV section 6, article VI section 1 or article XV section 2(a) that the member desiring to purchase is ineligible to use the resources of the Fund."

The article quoted above imposes several conditions that have to be observed before a drawing can be made on any of the facilities. There are two notable conditions that deserve special treatment, and these are those placing quantitative limitations on the amounts to be purchased, and that requiring such purchases to be consistent with the purposes of the organization.[12]

(iv) <u>Quantitative limitation on purchase</u>

Paragraph 3(iii) of article 3, contains two limits on the amounts of resources a member is permitted to utilize at any one time. The first limitation is that in any one period of twelve months, a member may not make purchases that would increase the Fund's holdings of that member's currency by more than twenty-five percent of its quota.[13] The second limitation is that the total outstanding purchases by any member in all the facilities should not increase the

12. See article 3 section 3 paras (i) and (iii) of the IMF Articles of Agreement.

13. It should be noted that a member requiring funds from the IMF deposits its own currency with the Fund in exchange for an equivalent amount in other currencies.

Fund's holding of that member's currency above two hundred percent of its quota. Although these limitations can be waived in exceptional circumstances,[14] they constitute a serious impediment on countries suffering serious balance of payments problems the magnitude of which may not adequately be resolved by a mere two hundred percent of their quota in the Fund. In any case countries that are most likely to suffer a balance of payments problem are those dependent on exports of primary commodities like copper that suffer from perpetual price fluctuations, and it is these same countries that have small quotas in the organization.[15] This situation creates a cycle in which a least developed country for example, is understandably allocated a small quota in the Fund because it is poor and most likely to suffer from economic problems resulting from price fluctuations for its commodities. The small quota automatically means that it can only be able to draw so much from the Fund facilities, an amount that might not be adequate to meet its problem thereby necessitating its continued dependence on future drawings.

(v) Consistency with Fund articles and policies

Another important condition attached to the use of the Fund resources is that the Fund has to satisfy itself that any request for funds in all the facilities except those made under the reserve tranche are consistent with its Articles of Agreement and policies. The Fund's power to

14. See article V section 4 of IMF Articles of Agreement.

15. Quotas in the IMF are determined by a country's economic position.

examine representations means that there is no de facto automaticity in the use of its facilities. This has been made clear by the Executive Board which expressed the view that,

> "As a result of the adoption of article V section 3(d) the Fund will not have the power to create any new facility in the general account for the unconditional use of its resources."[16]

The main reason for the decision not to allow any further unconditional facilities was that since a new facility had been created in the form of special drawing rights (SDRs), any future need for resources could easily be categorised as a need for reserve assets and would therefore be met under the SDR facility without necessarily having to create another facility. But perhaps a more important reason may be found in the voting procedures in the Fund in relation to use of resources. The policy of the Fund in relation to the creation of unconditional facilities until then required a majority of votes cast in the Executive Board. On the other hand, the use of the SDR account required a majority in the Board of Governors of 85 percent of the total votes. This situation created a contradiction in the sense that failure to obtain the requisite majority for drawing in the SDR account could have been easily circumvented by the creation of unconditional facilities which merely required a simple majority in the Executive Board.[17]

---

16. See paragraph 34 of Executive Board to the Board of governors of April, 1968, recommending modification of the articles of agreement.

17. For the majority required for the allocation of SDRs, see Article XXIV section 4.

Although there might be justifications for these conditionalities, it can equally be argued that they do provide tighter controls on the use of the resources of the Fund and have in many ways contributed to allegations of the IMF's interference in domestic affairs of member countries.

III. Compensatory Financing Facility (CFF)

The Compensatory Financing Facility is one of the special facilities operating in the IMF. The facility was created by a policy of the Fund in 1963[18] after it was realized that primary commodity exporting countries were more inclined to suffer in their export earnings than exporters of industrial goods.[19] It should be mentioned that the CFF was created before the amendment to article V of the articles of agreement which removed the power of the Fund to create unconditional facilities. The change in article V was however, made without prejudice to the already existing CFF. In fact express mention of this policy (CFF) is made in article XIX (j) of the articles of agreement which states that,

> "Gold tranche purchase means a purchase by a member of the currency of another member in exchange for its own currency which does not cause the Fund's holdings of the member's currency to exceed one hundred percent of its quota, provided that for the purposes of this definition the Fund may exclude purchases and holdings under policies on the use of its resources for compensatory financing of export fluctuations."

---

18. Executive Board decision no. 1477(63/8), February 27, 1963.

19. See report by the Fund to the UN Commission on international commodity trade entitled "Fund policies and procedures in relation to the compensatory financing of commodity fluctuations. IMF staff papers, vol. VIII, 1960-1961.

The reference to CFF in the above article merely enables the Fund to float the policy in relation to the gold tranche in the sense that drawings under the policy would not be taken into consideration when calculating the one hundred percent of quota requirement in the gold tranche. It does not in any way suggest that the facility is unconditional. Thus despite the facility having been created at the time when the Fund had the power to create unconditional facilities, it may contain conditions which a purchasing member has to satisfy before making the purchase.

IV. Conditionality under the CFF

There are two conditions that have to be satisfied by an eligible member before it can be able to draw from this facility and these are that, it satisfies the Fund that it will cooperate in finding solutions to its balance of payments problems, and secondly to show that the balance of payments shortfall is attributable to circumstances beyond its control.

(a) The first condition which any member wishing to purchase under this facility has to satisfy is that it convinces the fund that it

> "... will cooperate with the Fund in an effort to find, where required, appropriate solutions for its balance of payments difficulties." [20]

The undertaking required to be made by a member is to cooperate in an effort to find appropriate policies but

---

20. IMF, The problem of stabilization of prices of primary products: Report of Executive Directors and scope for action by the Fund. IMF (Washington), 1969, pp.14-15.

there is no indication as to what these appropriate policies ought to be. And although there is no express requirement for a member to provide the undertaking, the policy of the Fund is that a request for a purchase beyond the first 25% of a member's quota would be met only when the Fund is satisfied that the member concerned has been cooperating with the Fund in accordance with its undertaking. The implication here is that the Fund is in a position to dictate the appropriate policies to a member and that member is obliged to cooperate. The requirement to cooperate however, does not mean that the purchasing member would be in violation of its obligations if it departs from the observance of policies in support of which the Fund made its resources available. What it does mean is that a member who does not cooperate might find itself ineligible for future use of the resources of the Fund because it might be regarded as using the funds in a manner contrary to the purposes of the Fund.[21] The power to limit a member's future use of resources is the absolute discretion of the Fund which in practice has shown reluctance to exercise it. Instead it has ingeniously developed techniques that avoid the appearance of sanctions, and which are therefore less injurious to the feelings of members. Such techniques have included publicity, informal communications with members, and political pressure.

(b) The second condition attached to the use of the CFF

---

21. Article V(5), IMF articles of agreement.

relates to the requirement that the Fund exercise subjective judgements as to whether a member is encountering payments difficulties, that the balance of payments shortfall is of a short term character and largely attributable to circumstances beyond its control. These requirements do give the Fund ways of scrutinizing the economies of the purchasing member. The member purchasing, on the other hand, is obliged to make available the necessary information otherwise it risks not receiving the funds it is seeking.

V. Other characteristics of the CCF

(i) Country coverage

The CFF is open for use by all the members of the IMF, although it is expected that only developing countries will make use of it. This means that the facility is not in fact aimed at the poor countries that depend on exports of primary commodities since any country member of the IMF may use it regardless of its economic strength. This is made very clear by the decision of the Executive Directors setting up the facility in February 1963.[22] The Directors made it clear in that decision, that the facility was to apply in principle to all members encountering payments difficulties produced by temporary export shortfalls during the latest twelve months for which a reliable estimate of export proceeds can be made. But although the decision is drafted so that it applies in principle to all members, and is, therefore not limited to a class of IMF members, it does

---

22. Executive Directors Decision no.1477(63/8) of 1963, as amended.

mention primary producers as a special object of concern. This mention of primary producers creates the impression that the main object of concern for the facility is producers of primary commodities who are members of the Fund. In practice however this does not appear to be the case.

The use of the facility has not been confined to producers of primary commodities nor has it shown any substantial bias in favour of such countries. In fact many countries have utilized the facility in circumstances not quite connected to the problems of primary producer countries. An example of this is to be found in the Executive Board decision of August 2, 1979,[23] which allowed members to purchase from the facility in the event of them suffering a balance of payments problem resulting from shortfalls in merchandise exports, travel and workers remittances. For the first time therefore a member could include services in its calculation of the shortfall. As a result of this a number of developed countries whose economies depend to some extent on services, began to utilize the facility. One of the countries which has utilized this facility due to a shortfall in its balance of payments resulting from a shortfall in exports of merchandise, travel and worker's remittances is Yugoslavia which drew SDR 138.5 million in 1979. Many other countries that would technically be classified as developed, have been

23. Decision no. 6224-(79/135).

continuously drawing from the facility. Romania, Korea, Iceland, Israel, New Zealand, Australia, and South Africa have all drawn from the facility.

The problem that arises by allowing developed members to use this facility relates to the nature of the quota system in the IMF. Member's quotas in this organization are determined by each member's level of economic development. The highly developed countries make higher contributions and the least developed contribute less. Since the policy of the Fund is that a member can draw up to 100% of its quota, the higher a country's quota is the higher is the amount it can draw.[24] The problem is, there is a limit to the amount of funds in the facility and drawings by a few developed countries at once may create a crisis in the facility if not actually exhausting it. To be of substantial benefit to those countries in the developing world who face disruptive balance of payments problems, the use of the CFF should be deliberately restructured and confined to helping the commodity producers from developing countries. This afterall is what the various United Nations resolutions on the new international economic order (NIEO) have called for - the transfer of resources from the developed countries to the developing countries. The CFF would be an instrument of such a transfer if the country coverage is specified to cover developing countries dependent on exports of primary commodities. Indeed this had been the reason for the facility's creation.

---

24. Executive Board decision, No.6224-(79/35) Ibid.

(ii) Trade coverage

The CFF scheme covers deficits arising out of export shortfalls. This policy does not specify the type of merchandise that should be taken into consideration when calculating the shortfall. Lack of this specificity seems to suggest that the facility covers the totality of a members' export trade in commodities and services. The practice of the IMF since the creation of the facility supports this view. To date a number of countries both developing and developed have utilized the facility to cover export shortfalls which have been calculated from the totality of their exports excluding manufacturers. Shortfalls in the export of primary commodities, both agricultural and minerals as well as export of services have been accepted by the Fund as sufficient reason for a country to draw from the facility.

(iii) Conditions for eligibility

A member is eligible to draw from the facility if it can show that it is encountering balance of payments problems, provided however that the Fund is satisfied that,

> "the shortfall is of a short-term character and is largely attributable to circumstances beyond the control of the member, and the member will cooperate with the Fund in an effort to find, where required, appropriate solutions for its balance of payments difficulties." 25

---

25. See Executive Decision of December 29, 1965 issued as Press release No. 75/65 of December 29, 1975. For text see IMF Survey, January 5, 1976, p.1.

The first two conditions which require a member seeking the use of the facility to show that it is encountering a temporary balance of payments problem, are consistent with the overall purposes of the IMF which seek to help members in their short term balance of payments problems. These two conditions do not therefore raise any difficult issue. It is the other two conditions which raise some problems in relation to member countries.

The conditions that the IMF should be satisfied with the shortfall is beyond the control of the member and that the member will cooperate with the Fund in seeking solutions clearly gives the Fund a subjective power in influencing the policies of members wishing to utilise the facility. This situation inevitably commits members to pursuing policies that are satisfactory to the Fund but which do not necessarily coincide with the aspirations of the country concerned. It is therefore true that the CFF eligibility conditions could result in the Fund exerting undue pressure on the intending purchaser to the extent of forcing the member to adopt policies that are contrary to its national aspirations or even destructive of its national aspirations. This interference will no doubt cast some doubt on the future effectiveness of the Fund's legal norms since such norms depend on the extent to which they are respected by members, and respect for them depends on the extent to which members are convinced that the norms promote their national and international interests.

(iv) Base for compensation

The formula used to calculate the extent of the shortfall is expressed in the Executive Board decision of December 29, 1975[26] which states inter alia that:

> "The shortfall for the purpose of (CFF) shall be the amount by which the member's export earnings in the shortfall year are less than the average of the member's export earnings for the five year period centred on the shortfall year. In computing the five year average earnings in the two post shortfall years will be deemed to be equal to earnings in the two pre-shortfall years multiplied by the ratio of the sum of earnings in the most recent three years to that in the three preceeding years."

This formula enables the IMF to determine the severity of the shortfall and therefore the size of the drawing to be made. The larger the shortfall the larger the amount of the drawing is likely to be. Thus for example, calculations based on this formula revealed that Zambia's exports declined in 1975 from an average of SDR 1082 million in the two preceeding years to SDR 648 million. This represented a 4.35% shortfall, and on the basis of which Zambia was able to draw SDR 19 million.[27] On the other hand, in January 1983 calculations revealed that Zambia's export shortfall for the year 1982 was 7% below its average earnings for the two preceeding years. Because of this shortfall, Zambia was allowed to draw the equivalent of SDR 34 million.

One significant aspect of this formula is that the IMF is not bound to adhere to it, if it considers that the results of the computation appear unreasonable. This flexibility allows the Fund considerable scope for adjusting

---

26. See IMF Press release no. 75/65, Dec.29, 1975 para 6.
27. At current exchange rate for the SDR.

the base for calculation in accordance with its own wishes, and therefore affecting the amounts an affected member would be allowed to draw.

(v) Limits on the use of CFF

Present limits on drawings that can be made under the CFF were set out under a decision of the Executive Board in 1979, a decision which had the effect of substantially liberalizing the facility.[28] This decision raised the total drawings that could remain outstanding at any one time to 100% of a member's quota in the Fund but provided that the drawings do not exceed 50% of such a member's quota in the Fund in any period of 12 months except in cases of major emergencies and disasters. In such emergencies and disasters, the limit would be raised to 75% of a member's quota but only if the Fund is satisfied that the member is cooperating with it in finding solutions to its problems.

Taking the above limitations into mind and applying them to Zambia, a country of particular interest to the writer, the inadequacies of the facility to solve the problems of primary commodity exporting developing countries become glaringly obvious. Zambia's quota in the IMF is SDR 211.5 million[29] and assuming that the country had no commitments under other facilities of the Fund, the maximum it could

---

28. Decision no. 6224 above note 30.
29. IMF Survey, March 7, 1983 page 69.

be able to draw in any one period of twelve months would be SDR 105.75 million representing 50% of its quota. It is worthwhile to compare these figures with the actual shortfalls Zambia has experienced in the past few years. In 1975, for example, the value of Zambia's exports declined from an average of SDR 1082 million to SDR 648 million due primarily to lower prices of copper. The actual shortfall for that year therefore was roughly SDR 434. But since 50% of Zambia's quota which is the limit of its drawings for any period of twelve months, amounts to only SDR 105.75 million, and even assuming that it had no previous commitments to the facility and therefore capable of drawing the entire amount, its drawing of SDR 105.75 would only be able to cover a quarter of the actual shortfall. In actual fact Zambia having had other earlier commitments was only able to draw SDR 19 million. Similarly, in January 1983, Zambia was able to draw only SDR 34 million despite experiencing a proportionately higher shortfall than in 1975.[30]

The limits imposed by the IMF on the amounts of drawings restricts the possible benefits that a commodity exporting country experiencing shortfalls may be able to obtain from this facility. A further liberalization of the limits to allow for higher drawing limits would go a long way in combating the balance of payments problem facing a number of developing countries dependent on the export of primary commodities.

---

30 The 1975 shortfall amounted to about 4% while in 1973 it was more than 7%.

(vi) Conditions for repayment

Like in the case of all IMF facilities, the procedures in relation to the CFF require that the borrowing member deposit an equivalent amount in its own currency with the Fund which must then be repurchased with foreign exchange to cancel the debt. The repayment or repurchase period varies between three and five years depending on various circumstances. In addition however, approximately after one or two years,

> "(the Fund) after consultation with the member may recommend to the member that, in view of an improvement in its balance of payments and reserve position, it should make a repurchase in respect of a part or all of the outstanding drawing."[31]

One of the difficulties of this procedure is that it does not allow flexibility in the condition of repayment even where the country responsible does not only continue to experience balance of payment difficulties but its position worsens. Thus for example, Zambia which has experienced a continuous balance of payments problems resulting from poor copper prices since 1975, has had to comply with the repayment conditions very rigidly. This has obviously meant that its position has been aggravated during the periods when the repayments are due. A more flexible procedure is certainly called for if such countries are to be helped out of their present dilemma.

(vii) Rate of interest

A service charge of 0.5% is normally levied on all drawings made under the CFF scheme. In addition to this

31. Executive Board decisions no. 102(52/11) of Feb.13, 1952, no. 270-(53/95) of Dec.23, 1953 and Executive Board Decision of Dec.29, 1953.

service charge, a borrowing country has to pay an interest on all outstanding balances. The interest rate is calculated on the basis of a sliding scale that rises from 4.0% per annum for loans outstanding for less than one year, to a maximum of 6.0% per annum on those balances outstanding into the fifth year. The rate of increase in the interest is 0.5% for every year there is an outstanding balance.

These charges have their basis in the IMF articles of agreement which authorize the Fund to levy uniform charges for all members on the average balances of their respective local currencies held by the Fund in excess of their quotas. The articles in addition, provide for the rate of charges to rise according to the length of time that balances in excess of quota remain outstanding and also in relation to the amount outstanding.[32]

There is no doubt that such a high rate of interest tends to diminish the effect the CFF would otherwise have on the member countries experiencing balance of payments problems resulting from shortfalls in their commodity exports. For example, Zambia drew from this facility a total of SDR 34 million in January 1983. If this amount is subjected to a service charge of 0.5%, the resulting charges that would have to be levied would amount to about SDR 0.17 million. In addition an interest charge of between 4% and 6% of the outstanding balances would have to be paid

---

32. Executive Decision of Sept.1974. IMF Survey Sept. 30, 1974.

until the loan is finally discharged. Although it is difficult to know for sure what the outstanding balances would be in the future, it seems unlikely that Zambia would be able to discharge its loan before the end of two or three years. On this assumption, and using 4% as the rate of interest, it would not be overstating the fact if one ventures to suggest that Zambia would have to pay an interest rate of anything between SDR 2 million and SDR 4 million. If these estimates are close to the truth, then it becomes obvious that the interest rates charged by the IMF limit severely the actual resources that are finally made available to a member facing a serious shortfall in its export of commodities. In other words, the resources made available under the CFF are inadequate to meet the demands of countries whose commodity exports face continuous gloomy prospects on international markets. The high interest rates coupled with service charges merely diminishes the resources available to these countries even further. A change in the rate of interest charged or a complete abolition of these rates would go a long way in making more resources available to these countries. It might be argued that the Fund needs to levy these rates to meet its administrative costs as well as other costs. This is obviously true from a purely economic point of view. But if the CFF is meant to help countries experiencing export shortfalls, particularly developing countries, then other ways and means of meeting these costs could be worked out on a global basis to help in particular those countries that cannot meet the charges.

One of the important tenents of the New International Order is a call for the transfer of resources from the developed world to the developing world. One way of helping this process would surely be a scheme within the IMF which would obligate the rich countries to meet the interest rates that fall due to the IMF from poor countries utilizing its various facilities.

VI. Zambia's experience with the CFF

No copper exporting country used this facility between 1963 and 1970, a period that had been characterized by high copper prices on the world markets. The sharp drop in the prices of copper that began in the early 1970s, has resulted in an increased use of this facility by all major copper exporting countries in the developing world.

The first use of the facility by any major copper exporting country was in December 1971 when Zambia drew SDR 19 million, and ever since the drawings by these countries has followed closely the ups and downs of copper prices on the world markets. The first downward trend in the world prices of copper was experienced in the first half of the 1970s. As a result of this downward trend, all major copper exporting countries - Chile, Peru, Zaire, and Zambia had by 1975 made substantial purchases under this facility. Chile had purchased a total of SDR 79.0 million, Peru SDR 30.75 million, Zaire SDR 28.25 million, and Zambia SDR 57.0 million.[33]

---

33. Source of figures is map on page 306 of IMF Survey 13 Oct. 1975.

The close correspondence between the movement of world prices and the use of this facility by copper exporting countries can be illustrated by the case of Zambia which made three drawings during this period. The first drawing by Zambia was in December 1971 and involved SDR 19 million. This drawing followed a 34% shortfall in receipts from copper experienced that year as a result of a combination of two factors, the Mufulira mine disaster of September 1970 which had reduced production by 11% and the decline in world copper prices. A second drawing of SDR 19 million was made in August 1972 as a result of the new Fund policy that allowed members to increase their outstanding drawings up to 50% of their quota in any one year in cases of a shortfall resulting from disasters or major emergencies.[34] The third drawing of SDR 19 million was made in December 1975 for purposes of alleviating that country's balance of payments problems resulting from a shortfall in export earnings suffered in the twelve months ending June 30, 1975. In this shortfall year, the value of Zambia's exports fell by 35% below the previous year's level.[35] This decline was accounted for entirely by a steep fall in the value of copper exports which comprise more than 90% of Zambia's total exports, resulting from falling world prices.

---

34. Prior to this decision, the outstanding drawing in such cases was only 25% - see 1963/1966/1969 decisions.

35. IMF Survey Dec.15, 1975.

The slump that followed after 1975 created serious balance of payments problems for copper exporting developing countries, forcing them to depend even more on drawings from the CFF. Thus in the two years between 1975 and 1977, all the four major exporters drew substantial amounts from the facility. Chile drew SDR 79 million in June 1976, Peru SDR 61.5 million in May of the same year, Zaire SDR 56.5 million in March 1976, and Zambia SDR 19 million in June of the same year.

Pressure has continued to be exerted on the balance of payments of these countries due to the continued slump in the world copper prices. Between 1978 and the first half of 1983, all the four countries have again made substantial purchases from this IMF facility. Zambia for example has during this period purchased a total of SDR 93.3 million,[36] all as a result of shortfalls in its export receipts resulting almost entirely from low copper prices on the world markets. This situation has created some kind of dependence on the IMF Compensatory Facility by these countries. It is this dependence which raises serious questions about the usefulness of this kind of facility. Amongst these questions is one that relates to the effectiveness of the scheme in solving problems facing member countries, particularly developing ones whose economies depend on the export of primary commodities such as copper. It would

36. It purchased SDR 59.3 millionin Oct.26, 1981 and SDR 34.0 million on Jan.10, 1983.

seem that the structure of the scheme is not geared at solving these countries' problems once and for all but to deal with the problem in a piecemeal fashion. This approach, though helpful as a temporary measure, tends to create a dependence by the countries concerned. To break this dependence, more permanent measures need to be employed using other fora since the IMF by its very nature, can only provide piecemeal solutions to problems facing exporters of such commodities.

VII. Evaluation of the scheme

The principles behind the IMF compensatory financing scheme emphasize a temporary treatment of the balance of payments problems arising out of fluctuations in the world prices of commodities. This temporary approach has meant that the IMF treats the problem of commodity price fluctuations as capable of being solved by way of receipt stabilization rather than price stabilization. This approach has resulted in the IMF leaving the issue of price stabilization on the side, and concentrating on stabilizing the export receipts of commodity exporting countries by way of compensating shortfalls in those receipts as they arise. This approach therefore, does not aim at attacking the root cause of the commodity problem but merely seeks to ameliorate the difficulties resulting from commodity price fluctuations. It is understandable that the IMF has taken this approach because its articles of agreement clearly charges it with the responsibility of helping member countries overcome temporary difficulties arising from shortfalls in their export receipts. In fact it must be conceded here that the IMF approach coupled with a more permanent solution to the problem of commodity price fluctuations should be the desired goal of all commodity exporting countries. The problem however is whether the IMF through the CFF has played its part in solving the commodity problem or whether it can improve its performance in this regard.

First of all, the IMF scheme is not commodity oriented but is based on considerations of the global balance of payments and does not therefore concern itself with the equally crucial problem of balance of trade or the export situation of a given commodity or group of commodities. As a result drawings from the scheme become dependent on the effect that low commodity prices would have on the balance of payments of any one given country. Thus even where the prices of a given commodity have shown a downward swing, but for one reason or another such a slump does not affect that country's balance of payments position, then no use can be made of the facility. The problems of commodity price fluctuations would be tackled more effectively without reference to the issue of balance of payments.

The second shortfall of the IMF compensatory scheme even as a supplement to other efforts is the fact that it involves loans to those countries whose export commodities experience low prices on the world markets. These loans bear an interest and are linked and limited by reference to the quota system in the organisation. This means that the available resources to member countries are first and foremost limited to the contributions such members made to the fund. Thus a small contributor can only expect to draw so much even though the low prices for its commodity might be serious. In addition it has to contend with paying the normal IMF interest rates which in effect have a tendency of diminishing even further the so called compensation that it would have otherwise received. The sum total of all this is that the facility does not appear to provide adequate resources for countries such as copper exporters whose commodities suffer frequent price fluctuations.

The IMF Compensatory Financing Facility does not as a matter of principle make a preference for developing countries. It has tended to adhere strictly to the non-discrimination principles similar to that found in the General Agreement for Tariffs and Trade (GATT). Strict adherence to this principle has meant that all members of the organisation are able to draw from the facility irrespective of the impact low commodity prices might have on their economies. Countries as developed as Iceland, Australia and New Zealand have been able to draw side by side with less developed countries such as Tanzania and Zambia. And since the amount a country can draw depends on its quota in the organization, the developed countries have drawn higher amounts because of their bigger quotas. But it is no secret that such countries are not as seriously affected by low commodity prices as the less developed countries who in certain cases depend entirely on such commodities. Thus despite the serious economic problems that Zambia has faced in the last decade as a result of low copper prices, it has only been able to purchase from the IMF facility SDR 169.3 million in the six purchases it has made since 1971. This should be contrasted with for example one drawing made by Yugoslavia in February 1980 of SDR 138.5 million and SDR 160 million purchased by Korea in July 1980.

VII. Conclusion

The IMF compensatory scheme cannot on its own provide a solution to the problem of commodity price fluctuations but can perhaps merely supplement other global efforts. But even in its supplementary role, the scheme seems to have serious flaws which if allowed to persist might only be to the disadvantage of commodity producing countries in developing countries. This is because the resources available to these countries under the scheme are very limited and therefore not adequate for them to alleviate problems caused by low commodity prices. Although the resources under the scheme are limited, these countries will always be tempted to use the facility because at least it offers a temporary relief to their problems. This will inevitably result into an overdependence. This overdependence will lead these countries into a debt problem which will not be easy to overcome because they will have to borrow from other sources in order to meet their obligation to the IMF.

A restructuring of the IMF to conform to the general principles in the New International Economic order (NIEO) in order to deliberately facilitate the transfer of resources from the rich countries to the poor ones would seem to be the best option for even the advocates of the compensatory system.

The restructuring of the scheme should seek to increase the limits on the amounts available to member countries experiencing balance of payments problems arising out of the decline in the prices of their export commodities, Secondly, the resources available in the scheme should be used exclusively to cover shortfalls in primary commodities as opposed to shortfalls in travel and worker remittances. Finally, the restructuring of the scheme would need to tackle the problem of the rate of interest charged for the use of the facility which does impose further strain on the countries utilizing the facility. On this last point, exempting all developing countries heavily dependent on one or a few commodities for their export earnings from paying interest on the loans may go a long way in improving the usefulness of the facility in as far as these countries are concerned.

CHAPTER EIGHT

EXPORT EARNINGS STABILIZATION ARRANGEMENTS UNDER THE LOMÉ CONVENTIONS

I. Equitable distribution of global resources in international law

A more recent scheme for the stabilization of export earnings to which Zambia may turn to in the event of fluctuations in the export earnings from copper is that operating under the Lomé Convention. The Lomé Convention brings into association countries forming the European Economic Community on the one hand and a group of African, Caribbean and Pacific countries on the other. The two groups of countries are referred to hereafter as EEC countries and ACP countries.

The conclusion of the Lomé Conventions in many ways reflects the desire of the EEC countries to maintain their sources of raw materials in the ACP countries and the desire of ACP countries to ensure the equitable distribution of international resources particularly in relation to problems facing primary commodities.

One question that arises in this regard is as to whether there exists a legal right in international law of access to raw materials and a legal right obliging developed countries to provide financial resources to the developing countries. Determining this would help to put the Lome stabilization schemes into its rightful perspective.

Generally speaking, the developed and industrialized countries do assume the existence of a legal duty on the developed countries to provide them with access to primary commodities. This assumption was clearly brought to the fore during 1975 when oil prices were increased by OPEC members. Most industrialized countries condemned the OPEC measures as acts of economic coercion and sabotage and which contravened principles of international law. There is however, no evidence at present to support such a presumption. Professor Brownlie states the international law position as follows:

> "For a while it would seem that the formation of a duty to make resources available to those states which need them would be premature, such a duty would need to be of general application and cannot apply to the oil requirement of developed states but not for example, to the grain requirement of other states.[1]

The suggestion here would seem to be that if such a legal right of access to raw materials by industrialized countries existed, then such a right would have to apply to developing countries who would claim access to financial resources in industralized countries.

Developing countries have also assumed the existence of a legal right of access to financial and technological aid. This assumption seems to run through all the NIEO documents which contain numerous references to notions of equity and equitable distribution of international resources. For example, the preamble to the Charter for Economic Rights and Duties of States declares that:

1. Brownlie, I., "Loaves and fishes: Access to natural resources and international law." An inaugural lecture delivered at LSE in 1978.

> "... it is a fundamental purpose of the present charter to promote the establishment of the NIEO, based on equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic and social systems."2

"Equity" as used in the NIEO documents convey ideas of "fairness" "righteousness" and "justice". All these notions appear to represent moral ideas rather than fast legal principles that may justify the existance of a legal right on the part of developing countries to claim a right of access to financial resources from the developed and industrialized countries.

This reasoning finds support in a number of decisions made by various international tribunals. On all occasions when such tribunals have had opportunity to consider the legal implications of terms such as equity, the tribunals have not seen fit to define such terms but have merely acknowledged the applicability of such principles in relation to certain specific issues. These issues have included demarcation of continental shelves and territorial apportionement. For example, in the case concerning the Diversion of the Waters of the River Meuse, Judge Hudson used the term "equity" in a broad sense of an equal and fair application of legal norms to specific factual situations.[3] In a more recent case, the Barcelona Traction case, where questions of diplomatic protection were raised the tribunal was of the view that the notions of equity

---

2. Charter of Economic Rights and Duties of States.

3. The Diversion of the Waters of River Meuse (Netherlands v. Belgium) [1939] P.C.I.J. Series A/B No. 70, pages 76-77.

implied the reasonable application of the principles of law.[4] Similarly, the International Court of Justice has invoked notions of equity in the context of delimitation of continental shelves. Thus in the North Sea continental shelf case,[5] the International Court of Justice (ICJ) ruled that article 6 of the 1958 continental shelf convention had not crystallized into customary international law thereby binding the Federal Republic of Germany which was not a contracting party to the treaty. Since therefore, the provisions of the convention did not govern the delimitation of the shelf as between the Federal Republic on the one hand and Netherlands and Denmark on the other, the court called for the disputing parties to use notions of equity with a view to reaching delimitation agreements. In the Western Approaches Arbitration between the United Kingdom and France, the arbitral tribunal also invoked notions of equity in its efforts to delimit the shelf in the English Channel. In this case, the tribunal emphasized that:

> "The choice of the method or methods of delimitation in any given case whether under the 1958 convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles."6

From the above survey of the cases, two points emerge. First, that no tribunal has been prepared to define notions of equity and to suggest their general application in international economic law. Secondly by taking this approach, the courts have contributed to doubts as to whether such

---

4. The Barcelona Traction, Light and Power Company case (Belgium v. Spain), [1970] ICJ Reports, page 3 at para 36.
5. [1969] ICJ Reports, page 3.
6. (1979) 18 International Legal Materials, page 397.

notions are applicable or not to matters of access to raw materials or financial resources. Thus although the thrust of opinion in the United Nations regarding the reform of the international economic order is based on these principles, it appears doubtful whether international law recognizes a duty on any country to provide access to its resources. This being the case, the stabilization of export earnings arrangements in the Lomé Convention must be based on another premise.

II. The European Economic Community Association policy

Ideas for an effective system for the stabilization of earnings from primary commodity exports have evolved in different forms in the course of the past two decades. The most recent approach is that found embodied in the Lomé Conventions bringing into association the EEC and a number of African, Caribbean, and Pacific countries (ACP countries). The first convention was signed in Lomé, Togo on February 28, 1975 between the nine EEC countries on the one hand and 46 ACP countries on the other. Initially the convention was to operate for a period of five years which period expired on March 1, 1980 giving way to the signing of the second Lomé Convention which is due to expire in 1985. At the time of signing of the first agreement, it was praised as providing an importance advance in economic relations between the developed and developing countries in the drive towards a new international economic order. From the experience of the past seven years, there is reason to doubt that assessment.

The signing of the Lome Convention was in many ways, a direct consequence of the EEC's association policy contained in part IV of the treaty of Rome and parts of its implementing conventions. In that treaty, the purpose of assocation is stated as:

> "... to promote the economic and social development of the countries and territories and to establish close economic relations between them and the community as a whole."7

The association policy of the EEC is characterised by two main elements, namely, (a) the progressive establishment of a free trade area between the EEC and the associated countries and territories, by the reciprocal reduction of tariffs and quantitative restrictions[8] and (b) the establishment of a European Development Fund (EDF) for the purpose of granting community financial aid to the associated countries and territories to promote their social and economic development.

This association policy was motivated by the desire of the EEC countries to ensure their continued access to raw materials in their former colonies as well as by their desire to safeguard their markets in those areas through tariff reductions. Although the reciprocal reduction of tariffs may facilitate a freer flow of trade, and the assumption is that associated states would gain in having access to EEC markets and the EEC would gain in having access to the raw materials, it is obvious that the arrange-

---

7. Article 131 of the Treaty of Rome. For the text of the treaty see, L. B. Sohn (ed.), <u>Basic documents of African Regional Organizations</u>. Volume IV, (1972), p. 1529.

8. See the EEC treaty of Rome, part IV, Articles 133 and 134. Also Articles 1-7 of the implementing convention.

ment does not guarantee the associated countries a good price for their commodities. It is perhaps because of this flow, that the Community set up the European Development Fund (EDF) as a way of reciprocating the advantages the Community stood to gain in the associations. The key elements in this policy therefore, are the granting of preferential tariffs to the associated countries by the EEC as a means of assuring itself of a steady flow of raw materials from these countries, and providing these countries financial aid to invest in the production of such raw materials.

This desire by the EEC has helped to shape two schemes in the Lomé Conventions which aim either directly or indirectly at the stabilization of export earnings of the associated ACP states. The two schemes are the preferential treatment of these countries' primary commodity exports and the more direct income stabilization scheme - compensatory financing. The two schemes are discussed below in relation to Zambia's export earnings from copper.

III. The relevance of preferences to the problem of commodity earnings stabilization

Preferences in international trade relations, by their very nature, involve providing a more favourable treatment to certain trading partners in preference over other partners. Such preferences may be in the form of tariff reductions by one country to products originating from another country, or may take the form of preferential access of products of one country into the markets of another. In all the two cases however, the target is to provide a set of special measures that would help boost the trade of a disadvantaged partner. Tariff reductions would help the disadvantaged partner increase its export earnings by recouping that part of the earnings that would have been otherwise lost through tariffs. Similarly, preferential markets could ensure a developing country a steady market for its products and thereby assure it a steady flow of export earnings.

Preferences are usually maintained in bilateral trade agreements or multilateral agreements creating customs unions or free trade areas. Since the basic tenet of international trade policy has been based on the principle of non-discrimination which in its generalised legal form is embodied in Article I of the GATT, Preferences have been applied only as an exception to this rule of non-discrimination. It should be noted that inherent within the term "preference" is a measure of discrimination between trading partners which ordinarily would go contrary to Article I of the GATT. But it should be noted that the GATT does provide a departure from the rigid application of the rule of non-discrimination in Article I through its customs union exception in Article XXIV and more recently in its enabling clause.[9] Apart from preferences accorded under the customs union exception of the GATT, bilateral commercial treaties that provide for preferences usually contain an explicit restriction on the application of the

9. For text of the clause see GATT Doc. L/4903 of December 3, 1979.

MFN treatment. It follows of course from the freedom of states that the waiver or exception can be worded in a variety of ways. An example of the wording of such an exception in a commercial treaty is provided by an agreement between the Soviet Union and Somalia.[10] This agreement states that:

> "The provisions of (the most-favoured-nation clause) shall not apply to advantages which have been or which may hereafter be accorded by either contracting party."

Another pertinent example is Lomé II which provides under Article 9 paragraph 2(b) that:

> "The most-favoured-nation treatment referred to in subparagraph (a) shall not apply in respect of trade or economic relations between ACP states or between one or more ACP states and other developing countries."

The problem that arises regarding preferences and which has a serious bearing on the commodity export stabilization problem relates to whether such preferences are granted on a reciprocal or non-reciprocal basis. For if they are to be granted on a non-reciprocal basis, then the developing country beneficiary is not obliged to grant similar favours to the donor developed country. In such a situation, it is clear that the developing country would be gaining the advantage of increasing its export earnings through the payment of less or no duty on its exports. On the other hand, if the preferences given to such a country are dependent on the reciprocal granting of similar preferences to products originating from the donor developed countries,

---

10. Trade and payments agreement between the USSR and Somalia, signed at Moscow on June 2, 1961. UNTS volume 493, No.7214, page 186.

then it becomes obvious that such preferences as it might receive, in the markets of donor countries will be diminished by the reverse preferences it is obliged to offer.

Reverse preferences also affect the export earnings of a beneficiary developing country through possible retaliatory measures by other developed countries since such reverse preferences are generally opposed by the developed countries because of their discriminatory effect on such countries.[11] Developed countries, and in particular the United States, react to reverse preferences by explicitly or impliedly refusing to grant preferential treatment to products originating in those developing countries that provide such preferences to other developed countries. The adverse effects these measures have on the export earnings of the developing country concerned cannot be overlooked because at the end of the day, the benefits such a country receives from preferential treatment in one developed country are offset by restrictive measures imposed by other developed countries opposed to the granting of reverse preferences. In the final analysis, reciprocal preferences provide no tangible help in the stabilization of a developing country's export earnings and may in fact prove to be a costly liability.

Another problem with preferential schemes and which may have a bearing on the question of commodity earnings stabilization, particularly in the case of minerals, is the issue of rules of origin.

---

11. See for example, General Assembly Resolution 3362, UN GOAR Supp. I at page 3.

The purpose behind the "rules of origin" is to ensure that the exports of the country receiving preferences have a minimum level of local content when they arrive in the donor country. This means that the products on which preferences are sought must be shown to have originated in the country that qualifies for such preferences. These rules are meant to avoid a situation where products from third countries or with a substantial content from a third country benefit from preferences to which they are not entitled. Many commodities produced in developing countries clearly originate in those countries. But in certain instances, such as in the case of minerals, the processing stage may require the utilization of a number of imported inputs. In such a situation the problem of the "origin" of the products becomes crucial. For if the rules of origin for such products are very strict, the exporting countries concern would be unable to benefit from preferences unless of course they choose to export such products in a highly unprocessed state. However, it is common knowledge that the higher the level of processing a commodity undergoes, the more it is likely to fetch a better price. Stringent rules of origin may work to exclude highly processed commodities from the benefits of a preferential scheme, and therefore not only affect possible earnings from such a product but also work to restrict access of such products in the markets of the country providing such preferences.

All "rules of origin" currently employed under various preferential schemes in favour of the developed countries, approach the problem with the assumption that all products must have undergone processes which transform their specific characteristics to a substantial degree. This so called "substantial transformation" criteria however, is not free of ambiguity and does cause interpretation problems. It is for this reason that all goods entering international trade have been classified for customs purposes into 99 chapters under a system known as the nomenclature of the Customs Co-operation Council (CCCN). These chapters are further divided into four-digit tariff headings. This classification reflects the difference in character of goods as between one group and the other. A movement from one classification to the other has now become the standard way for defining "substantial transformation" in the rules of origin. There are however instances where this criteria has proved inadequate and it has been necessary to employ other criteria. For example, the EEC countries employ two other criteria, the so called percentage criteria and the process criteria.

The problem of defining the origin of goods entering a preferential area is therefore a real one and has a direct bearing on the issue of export earnings stabilization. This issue will be discussed fully later on in the chapter.

IV. Background to the Lomé Preferential scheme

(i) Preferences under GATT

The historical background to the preferential scheme in the Lomé Convention may be traced to the signing of the General Agreement on Tariffs and Trade (GATT).

One of the most important principles of the GATT is the so called Most-Favoured Nation Clause. This clause as it applies to international trade had before the conclusion of GATT, been used in earlier treaties of friendship, commerce, and navigation and had as its main aim providing parties to such agreements treatment no less favourable than that accorded by them to third party trading partners. With the signing of the GATT, this principle was given legal sanctity in Article 1 of the agreement. The general effect of this Article is well summed up by the International Court of Justice, which described it as requiring,

> "the maintenance at all times of fundamental equality without discrimination among all the countries concerned."[12]

The MFN standard does however, have an inherent contradiction in present day international economic set up. As Raúl Prebisch pointed out at the first UNCTAD meeting in 1964,[13] no matter how valid this principle may be in trade relations among equals, it is neither an acceptable nor adequate concept for governing trade between countries with unequal economic power.

It is for this reason that one of the challenges posed by the United Nations resolutions calling for a New International Economic Order, has been the replacement of the non-discrimination norm inherent in the Most-Favoured-Nation standard with one that recognizes the necessity for preferential and discriminatory relations between in

---

12. Rights of US Nationals in Morocco, (1952), ICJ Reports, 176 at 192.
13. UNCTAD I debate, 1964.

particular, developed countries on the one hand and developing countries on the other.

It should be pointed out here that although GATT had for many years permitted exceptions to the application of the MFN principle, many of these exceptions were of no practical consequence to developing countries dependent on the exports of primary commodities. This point is illustrated by two of the exceptions. These exceptions are provided by Article XVIII which permits the creation of tariff shelters within which infant industries would grow,[14] and Article XXIV which permits members of a customs union or free trade area to grant certain tariff preferences among themselves to the exclusion of third parties. Although these exceptions may be of interest to countries dependent on the export of primary commodities, the benefits accruing to them through the exceptions are limited. In both cases, benefits would accrue to these countries if their markets were big enough to absorb whatever their industries would produce. But as it is, the developing countries' individual markets are too small to support any given industry of a substantial size. Even if groups of countries were to pull their markets together there are a number of constraints that would act to reduce the

---

14. Article I of GATT states that

> "... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediate and unconditionally to all the like products originating in or destined for the territories of all other contracting parties."

benefits of such a move. Thus for the moment at least, what these countries need and are seeking are protected and preferential markets for their products.

To satisfy this need, attempts were made to seek the amendment of Article I of the GATT so as to allow the granting of preferences for purposes of boosting the development process in developing countries.[15] This attempt faced vigorous opposition from some developed countries and the amendment therefore failed to materialize.

The failure to amend Article I of the GATT was followed in 1966 by a more positive approach. In that year, part IV was added to the GATT. This addition states in part that,

> "considering that export earnings of the less developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports, ..."

The GATT members agree to the fullest extent possible to

> "Accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties ... and in particular, refrain from introducing, or increasing, the incidence of customs duties or non-tariff barriers on such products and refrain from new fiscal measures, and seek to eliminate those in force which would hamper ... the growth of consumption of primary products in raw or processed form, wholly or mainly produced in the territories of less developed contracting parties."[16]

---

15. See proposals of Chile, India, Brazil and the United Arab Republic in the Committee on legal and institutional framework of GATT. GATT Doc. L/2147 of 24 February 1964.

16. Article XXXVI para 1(b) of GATT.

Interpreting Article I of the GATT in the light of the provisions of its part IV results in a situation in which preferences for developing countries appear to be an acceptable fact within the GATT. The interpretation of Article I in the light of part IV is a legally sound proposition since any rule acquires its full meaning only within the context of the other provisions in the convention that contains it. The ICJ has on many occasions emphasized this approach whenever it was called to interpret treaty provisions.[17]

The justification of the use of preferences through this interpretation is now reinforced by an enabling clause which was added to the GATT in 1979. The main provision in the clause reads as follows:

> "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to other contracting parties."[18]

This provision of the clause represents an official interpretation of the acceptability of preferences within the GATT system. In this respect, preferential schemes in favour of developing countries members of GATT instituted by GATT members in the developed countries may be assumed

---

17. In PCIJ (1922) series B numbers 2-3, page 23 the permanent court said that:

> "In considering the question brought before the court on the terms of the treaty it is evident that this should be examined as a whole and that its meaning should not be determined only in terms of certain phrases which out of context can be interpreted in more than one sense."

18. For the text of the decision see, GATT Doc. L/4903 of December 3, 1979.

to be consistent with the GATT provided that they conform to a number of conditions stated elsewhere in the enabling clause.

The provisions of the Lomé Conventions dealing with preferences for ACP countries must be understood in the light of these permissive provisions of the GATT. The Rome treaty creating the EEC and by virtue of which the Lomé conventions were made possible contains provisions which clearly reflect the GATT approach to preferences.

(ii) Preferences under the Yaoundé conventions

The immediate background to the preferential scheme in the Lomé Conventions is to be found in the Yaoundé agreements which represent the first attempt at the EEC association with a number of African countries. The first Yaoundé agreement brought into association the original six EEC countries on the one hand and seventeen African states and Madagascar, and it was concluded on July 20, 1963.[19] This agreement was renewed for a further period of five years in 1969.

One of the key elements of the two Yaoundé conventions was the establishment of a free trade area between the EEC and the associated states through the reciprocal reduction of tariffs for industrial products and a few tropical products. In this respect the first Yaoundé convention provided that:

---

19. For the text of the Yaoundé convention, see Louis B. Sohn (ed.), Basic Documents of African Regional Organizations, volume IV,(1972) p.1532.

> "Goods originating in Associated States (AASM) shall, when imported into member states (EEC), benefit from the progressive abolition of customs duties and charges having an effect equivalent to such duties ..."

The agreement provided further that,

> "In each associated state, goods originating in member states shall benefit under the terms set out in protocol no. 1 annexed to this convention, from the progressive abolition of customs duties and charges having an effect equivalent to such duties which that associated state applied to imports of these goods into its territory."[20]

Under these provisions it is clear that all favours granted by the EEC countries to the AASM countries in terms of tariff reductions were to be reciprocated by similar reductions on goods entering the Associated countries from the EEC except where development needs or requirements of industrialization in those states necessitated the retention, introduction of customs duties or similar charges.[21] Reciprocity was therefore a key element of the Yaounde preferential scheme.

(iii) Reciprocity under the Yaounde conventions

The concept of reciprocity as it was applied under the Yaounde conventions worked to diminish the value of preferences granted to the AASM countries. The diminishing of the value of preferences granted to the AASM countries arose simply because whatever benefits accrued to them as a result of them were written off by way of preferences these countries had to accord the products entering their countries from the EEC.

---

20. See Articles 2(1) and (2) of the first Yaounde convention.
21. Ibid., Articles 3(2) and 7(2).

This unfortunate situation had arisen under the Yaounde conventions despite the fact that the notion of reciprocity had been a subject of severe criticism elsewhere in the 1960s. The critics of the principle had pointed out that no justification could exist for the developed countries seeking concessions in the name of reciprocity each time they offered preferences to developing countries. In fact it was because of such criticisms that membersof the GATT replaced the principle of reciprocity with the opposite principle of non reciprocity in 1963. The decision to replace the principle of reciprocity in the GATT was made in an interpretative note which was added to Article XXXV, paragraph 3 of the GATT which states that:

> "The developed contracting parties do not expect reciprocity for commitment made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties."

With this decision the principle of reciprocity was to apply only to relations between the developed countries.

In view of the GATT's abandonment of the principle of reciprocity, there seems to be no good reason why the Yaoundé conventions should have insisted on the application of the principle. The only reason which the writer can see, is probably the fact that negotiations for the conclusion of the conventions had been well advanced at the time that the GATT reached the conclusion to abandon the use of reciprocity in relation to tariff negotiations with the developing countries. Nevertheless, the decision has had a great impact on the new scheme found in the Lomé conventions.

(iv) Reverse preferences under the Yaoundé agreements

Connected to the issue of reciprocity is the issue of reverse preferences. Trade arrangements under the two Yaounde agreements were in the form of a series of individual free trade zones between the EEC and the ASsociated States. This arrangement invariably meant that in return for duty free access for their products in the EEC markets, the Associated developing countries had to provide preferential treatment to imports from the EEC. The provision of preferences by the Associated countries to products imported from the EEC had the effect of creating reverse preferences. Many of the AASM countries covered by the Yaoundé arrangements were former colonies of some members of the EEC, and had all along been providing such preferences in their colonial arrangements. The Yaoundé arrangements merely maintained the status quo. The AASM states had accepted the reverse preferences in the Yaoundé agreements purely for political reasons - they did not wish to damage their relations with their former colonial partners so soon after they gained independence.[22]

There were two basic problems that the Yaounde "reverse preferences" posed. First of all the reverse preferences worked to prevent the AASM buying from the cheapest sources because they were under an obligation to grant preference

---

22. See discussion on this point in J. Pinder, "The Community and the developing countries: Associates and outsiders",(1973)Journal of Common Market Studies, No.I, page 53.

to the products of the EEC countries. This problem is only remotely connected to the problem of export earnings stabilization and we shall therefore not dwell on it.

The second problem, however, was significant to the issue of export earnings of the associated states. Developed states outside the EEC objected to the granting of reverse preferences because by their very nature, they are discriminatory and they tended to discriminate against other developed countries in favour of the EEC. The reaction of these other developed countries to what they regarded as discrimination is what is significant to the issue of the associated states export earnings. The United States for example, passed the Trade Reform Act in 1974 to counter the effects of reverse preferences such as those which were granted to the EEC by the AASM states under the Yaounde agreements. Under that Act, the United States decided that:

> "generalized tariff preferences will not be granted to any developing country which accords preferential treatment to the products of a developed country other than the United States, unless the President has received assurances satisfactory to him that such preferential treatment will be eliminated before January 1, 1976.[23]

This kind of retaliatory measure affected the trade of the AASM states to the United States in the sense that they were no longer able to export their products to the USA under preferential terms, unless they abandoned their commitments under the Yaounde agreements. The consequences of this, particularly to those AASM countries that exported

23. Article 604(6) of the United States Trade Reform Act of 1973.

substantial income from their exports through higher tariffs. Had this approach been followed by other countries outside the EEC, the export earnings of the AASM could have been seriously affected.

V. Preferences under the Lomé Conventions

A treaty embodying wide ranging measures of economic co-operation between the EEC and 46 developing countries in Africa, the Caribbean and the Pacific (ACP countries) was concluded on February 28, 1975. The ACP countries included in the agreement were the 17 Associates in the Yaoundé agreements; 21 commonwealth countries in Africa, the Caribbean, Pacific, and seven other African countries. This Convention replaced the Yaoundé agreement and the Arusha agreement which governed a limited form of association between the six EEC countries on the one hand, and Tanzania, Kenya, and Uganda on the other. The first Lomé Convention expired on 1st March 1980 and was replaced by the second Lomé Convention due to expire on February 28, 1985. Currently the convention includes over 60 ACP countries.

Trade preferences accorded to an individual developing country or a group of developing countries by one or a group of developed countries, as is the case in the Lomé Convention, essentially provide advantageous treatment quite distinct from what the position might have been in the absence of such a preferential scheme. A preferential scheme such as is contained in the Lomé Convention therefore, may provide advantages to a developing country in the sense of providing such a country with some form of steady access to the markets of the developed countries at a low tariff rate. In this way preferences do help the developing countries realize a steady and reasonable earnings from their commodities. If therefore, trade preferences worked as desired they would go a long way towards stabilizing the export earnings of primary commodities they export. The question in this respect is therefore whether the preferential scheme under the Lomé convention has worked towards stabilizing export earnings for a country like Zambia which exports copper.

Preferences are provided for under title I, chapter I of the current Lomé convention, which contains sixteen articles. These sixteen articles were the most difficult articles for the delegates to agree upon during the long negotiations leading to the conclusion of the convention. One of the difficulties in the negotiations concerned the nature of the preferential scheme to be included in the convention. This problem was a result of the diversity of countries involved as well as the number of export products that were to be covered by the scheme.[24]

The most important issues covered by Lomé II in relation to the preferential scheme are, access for the ACP goods in the EEC markets; the principle of non-reciprocity; access for community products to the ACP markets; and the rules of origin. In this respect Article 2 paragraph 1 of the convention provides that:

---

24. The Courier, No. 58, special issue, November 1979, page 26. Also the Courier, No. 31, special issue, March 1975, page 23.

> "Products originating in the ACP states shall be imported into the Community free of customs duties and charges having equivalent effect."[25]

This provision makes it clear that all products originating from ACP countries are generally to be exempt from customs duties and equivalent charges. Paragraph 2 of Article 2 however, excepts certain agricultural products from enjoying unlimited duty free access. The agricultural products concerned are those that come under the EEC common agricultural policy which seeks to ensure sufficient income for farmers inside the EEC and to maintain a balance between supply and demand of these products for the consumers in the Community. These excepted agricultural products do however, enjoy a more favourable treatment than the most-favoured-nation treatment applying to similar products from third countries.

Considering the generalized free access provisions in Article 2, it would appear that Zambian copper enjoys free access into the EEC markets. This free access however, does not cover all the copper exports from Zambia because only a certain percentage of its exports of copper end up in the EEC markets. For example, in 1979, Zambia exported copper worth about 900.7 million Kwacha, 345,125 of which entered the EEC markets.[26] The copper that entered the EEC markets therefore represented about one third of its total exports for that year. The Lomé preferential scheme covers

---

25. For the text of the second Lome covnention see, the Courier, No. 58, special issue, 1979.

26. The Republic of Zambia, monthly digest of statistics, vol. XVI, Nos. 10-12, October/December 1980 page 23, tables 24 and 25(a).

only the third of Zambia's total copper exports, and the free access provisions therefore benefit Zambia only in relation to this proportion of its exports. For Zambia to reap the maximum benefit from preferences, a global system that would cover all its exports is called for. A limited scheme such as that found in the Lomé convention is unlikely to steady the export income of that country because the benefits it gets from the scheme are almost certainly eroded by the unfavourable entry requirements for the rest of its copper in those countries that do not run preferential schemes.

(i) The principle of non-reciprocity

One of the difficulties that had arisen under the Yaoundé agreements had been the requirement that the preferences accorded by the EEC to the associated states had to be reciprocated by similar preferences being accorded to products of the EEC countries by the associated states. On the basis of this principle, the associated states had to remove their trade barriers for products originating in the European Community and to grant to so-called reverse preferences. Reverse preferences had the effect of diminishing the value of preferences granted to these countries by the Community, and invited retariatory measures from other developed countries which eroded the benefits from the scheme even further.

It is therefore significant that the Lomé convention provides under Article 9 paragraph I that:

> "In view of their present development needs, the ACP states shall not be required for the duration of this convention toassume in respect of imports or products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP states, under this chapter".

This paragraph makes it clear that the Lomé convention has abandoned the principle of reciprocity in favour of non-reciprocity. ACP countries like Zambia are therefore not obliged to grant reciprocal free access to imports from the EEC in return for the favourable treatment that their products receive in the EEC markets. The result of this change in relation to copper is that Zambia no longer runs foul of retaliatory measures such as those contained in the United States Trade Act. This means that earnings from the remainder of its copper exports to other developed countries are unlikely to be adversely affected by restrictions that could otherwise have been imposed to counter reverse preferences it could have been obliged to give to the EEC. This of course does not mean that Zambia is assured of a good price for its copper exports, but merely that its access to all markets will to a certain extent be assured. The significance of this situation is that its earnings from copper exports to countries outside the European Community will not unduly be diminished by restrictive measures. In this respect it is significant that the only obligation on Zambia under the Convention is to accord products from the EEC no less favourable treatment than that which it accords to products of other countries in the industrialized countries.[27]

27. Article 9 para 2(a) of Lomé II.

(ii) Rules of Origin in the Lomé Convention vis-a-vis Zambian copper exports to the EEC

The main objective of the Lome convention is to promote "trade between the ACP states and the Community, taking account of their respective levels of development, and also between the ACP states themselves."[28] To attain this objective, "products originating in the ACP states should be imported into the Community free of customs duties and charges having equivalent effect."[29] In order to prevent third countries deflecting exports to the EEC via ACP states and benefitting from lower tariffs than the EEC would get in those countries, it is important that rules exist to determine the origin of the goods before preferential treatment can be granted. The importance of such rules stem from the fact that such a deflection would undermine the EEC's external tariff and consequently affect the tariff preferences the ACP states receive under the convention. It is therefore important for both the EEC and the ACP states to observe the rules of origin.

There is no doubt that an ACP country like Zambia gains from the preferences it is accorded under the Lomé convention in the sense that it earns more from its exports to the EEC than it would have done in the absence of such preferences. But it is also true that Zambia may wish to increase its earnings even more by processing its copper

---

28. Article I, Title I of Lomé II.
29. Ibid., Article 2(I).

into products that may fetch a better price in those markets. In order to do this, it may require to use imported inputs from third countries. It should be pointed out that even the processing of a primary commodity like copper to a level where it can enter world markets may require the use of imported material. It is in this respect that rules of origin become important in ensuring that a minimum of local content in the resulting exports is maintained. In this section of the chapter we examine the Lome convention rules of origin as they affect Zambia's export earnings in the EEC markets.

About 40 per cent of copper exported by Zambia every year enters the EEC markets, and since Zambia depends on copper for up to 95 per cent of its export earnings, this market forms a substantial source of its export earnings. The preferential tariffs Zambia is accorded under the Lomé convention therefore, form a significant source of extra earnings which could have been lost in the absence of the preferences. But equally there is no doubt that through additional processing of its copper, Zambia could be able to increase these earnings even further. But since such processing inevitably requires the use of imported inputs, the Lome rules of origin assume a critical role. Stringent rules of origin may make it impossible for highly processed copper or copper products benefitting from the preferences in the convention. This may result in reduced earnings for Zambia even though its products may have been refined to a high level. It is in this connection that the Lomé rules of origin will be discussed here.

"Rules of origin" under the Lomé convention are set out in protocol No. I, title I[30] and are aimed at ensuring that preferences granted under the convention benefit exclusively the products originating in the ACP countries covered by the convention. It should be recalled that free access granted in Article 2 paragraph 1 of the convention relates to products originating in the ACP states. Products recognized by the convention as originating in the ACP states are spelt out in Article 1 paragraph 1 of title I of protocol No.I. This paragraph reads as follows:

> "For purposes of implementing the convention and without prejudice to paras 3 and 4, the following products shall be considered as products originating in an ACP state, under the condition that they were transported directly, within the meaning of Article 5
>
> (a) products wholly obtained in one or more ACP states
>
> (b) products obtained in one or more ACP states in the manufacture of which products other than those referred to in (a) are used, provided that the said products have undergone sufficient working or processing within the meaning of Article 3."

Among the products that the protocol considers wholly obtained in countries of the ACP which produce them are

> "mineral products extracted from their soil or from their seabed." [31]

It is clear from this provision that copper produced in Zambia is considered as originating in that country for purposes of the rules of origin. This position is not altered even though the copper might have undergone refining or smelting in another ACP state.[32]

---

30. *Ibid*., note 28.
31. Article 2(a) of protocol No.I of the second Lomé convention.
32. *Ibid*., Article I para 3.

Problems arise however, when Zambia wishes to process its copper using imported materials in an attempt to boost its export earnings. For the resulting products to benefit from the preferences in the convention, a further criterion has to be satisfied. This criterion requires that the processing be shown not to have substantially transformed the characteristics of the original product. The basic problem that arises in this regard is one of defining "substantial transformation". For this purpose all products entering international trade have been classified under the nomenclature of the Customs Co-operation Council (CCCN). This classification divides products into a number of categories and a movement of a product from one classification to the other is regarded as proof of "substantial transformation". But it has on occasions been argued that a product would change classification without necessarily having been substantially transformed. It is due to such problems that the Lome convention has supplemented the CCN classification with its own so called list A which covers cases of products changing classification without substantial transformation, and list B which covers products which should be considered substantially transformed when they move from one CCCN classification to another.[33] The products in list A, though changing classification, are considered not substantially transformed for purposes of the rules of origin, while list B covers those products though not having changed classification are to be regarded as substantially transformed for purposes of the convention.

33. See Annex II of Lomé II for list A, and Annex III for list B.

In the case of list A, this is supplemented by processes which are considered not to confer originating status and those that do. List B on the other hand is supplemented only with those processes that are to be regarded as conferring originating status. The consequence of this additional criterion under the Lomé convention is that certain products though having changed classification under the CCN arrangement, would not qualify as originating in ACP countries for purposes of tariff preferences because they would not be regarded as substantially transformed.

In the case of copper, list B spells out the processes and workings utilizing imported materials that would be considered sufficient to change the character of the resulting products and therefore denying them originating status for purposes of preferential treatment. The processes involved are smelting of copper matte; fire refining; electrolytic refining of unrefined copper; fusion and thermal treatment of refined copper.[34] It is obvious that the originating status given to copper in these forms is aimed at ensuring that the copper produced by countries like Zambia is exported to the EEC in its raw form or processed only to the extent necessary for its smooth and easy transportation to these markets. The Lomé rules of origin therefore appear to facilitate easy access to raw materials in the ACP countries by the EEC at cheap prices because it is obvious that refined copper for example, would fetch lower prices than say copper wires or copper tubes and pipes.

---

34. List B, tariff heading no. ex 74.01.

The restrictive nature of the Lomé convention rules of origin in as far as copper products are concerned, is made certain by another criterion. Under this second criterion, processing of copper into wrought plates, bars, wires, powders, flakes, wire cables, pipes, and other similar products,[35] are to be regarded as qualifying for originating status only if the imported ingredients used in their manufacture do not exceed 50 per cent of the value of the finished product.

This value added criteria has serious restrictive effects on efforts by a copper producing ACP country like Zambia which might seek to increase it s export earnings from copper through the export of finished products. Even assuming that labour costs in a country like Zambia, are low, processing of copper is a serious business which involves quite large economies of scale. This inevitably will require large inputs from abroad well beyond the 50 per cent limit provided under the convention. This can be illustrated by a study conducted by UNCTAD in relation to textile fabrics. UNCTAD estimated in that study that the implicit value added, using the cost structure and techniques of production in developed countries, was 86% of the value of the finish product. Yet the copper processing industry could be said to be more sophisticated than the textile industry.[36] If this study is anything to go by, it is

---

35. List A, tariff heading nos. 74.03 to 74.19.

36. Proposals for improvement and harmonization of the rules of origin under the Generalized system of preferences, UNCTAD, Geneva, 1973, Doc. TD/B/CS/WG/IV).

difficult to conceive how a country like Zambia could possibly meet the 50% requirement in the convention. It would seem unlikely therefore that Zambian processed copper products could ever benefit substantially from the preferences in the convention. In the final analysis it is submitted here that the rules of origin in the Lomé convention would appear to be more restrictive than is necessary to avoid trade deflection by third countries, and clearly work to limit the export earnings of a country like Zambia.

VI. Compensatory Financing under the Lomé Convention

One of the important innovations in the Lomé convention is the export earnings stabilization scheme which aims at alleviating the effects of export earnings instability on the economies of the ACP countries. The stabilization of export earnings is an extremely important matter for the ACP states, particularly those that depend on a single export product and thus whose balance of payments entirely depends on the income from such products. The stabilization of export earnings scheme in the Lomé convention is not an entirely new scheme since a similar scheme has been in operation under the Internationl Monetary Fund (IMF) since 1963. Though the concept is not new, its application in relations between industrial and developing countries is new.

The Lomé convention basically accords the ACP countries the "right" to compensation whenever they experience a sudden fall in their export earnings through factors such as unstable prices on the world markets or production set backs. This principle was first agreed upon between the EEC on the one hand and the ACP states on the other at the Kingston conference of ACP and EEC ministers in July 1974. The implementation of this principle resulted in the inclusion of a scheme commonly known as STABEX in the first Lome convention. The second Lomé convention has not only maintained the scheme but has included an innovation designed to tackle the problem of export earnings stabilization experienced by mineral exporting ACP states. This innovation is code named MINEX or SYSMIN.

Of all the areas tackled by the convention, STABEX and MINEX have special relevance to the problems of commodity price fluctuations and earnings stabilization. MINEX covers a number of mineral products which include copper. Although STABEX covers mainly agricultural products, its discussion will form a useful basis for the understanding of the MINEX scheme and its effects on the stabilization of Zambia's export earnings. Furthermore, since Zambia has recently embarked on a programme of diversification of its economy from one wholly dependent on the export of copper, to one that will also depend on agricultural products, the STABEX principles are bound to assume increasing importance to Zambia's relations with the EEC under future conventions.[37]

---

37. "Short term crisis long term prospects", an interview with President K. Kaunda, The Courier, no.55, May-June 1979 at page 8. President Kaunda emphasized the need for Zambia to utilize land to

 > "produce our basic foodstuffs which would enable us to develop agro industries and at a later stage export both the agricultural products as well as processed ones."

(i) STABEX Scheme

Like the IMF compensatory financing scheme, STABEX's main aim is to help alleviate the harmful effects of unstable earnings from commodity exports experienced by the developing ACP states. Unlike however, the IMF scheme which covers the totality of the export products of a country experiencing such difficulties, STABEX is limited in its application to a specified number of products.

STABEX is in many ways a product of the colonial trade relationship that existed between former colonial powers in the EEC and former colonies in the ACP states. Prior to the creation of the EEC, former French colonies in Africa enjoyed a guaranteed price for their primary commodities in the French markets. The Rome treaty creating the EEC abolished these guarantees because they were considered to be a violation of the free trade principles embodied in the GATT and upon which the EEC was to be based. But to maintain the French links with its former colonies, the EEC made provision for production and diversification aid to be accorded to these countries as a transitional measure until such a time as new measures were worked out. Similarly, former British colonies had prior to Britain joining the EEC, enjoyed privileged access to the markets of the United Kingdom. In this respect a number of preferences were included in bilateral treaties concluded between these Commonwealth countries and

Britain.[38] When joining the EEC, Britain like the French demanded safeguard measures to preserve this relationship.

In accepting the French and British demands, the EEC included in its protocol No.22 an ambiguous statement in which it expressed willingness to safeguard the interests of all those ACP countries whose economies depend to a large extent on the exports of primary products. It was on the basis of this provision of the protocol that the issue of export earnings stabilization arose during the negotiations leading to Lome I. During the negotiations that followed, two issues emerged. The first related to the nature of the stabilization scheme to be included in the scheme, and the second related to the type of products that were to be covered by the scheme.

As regards the first issue, the ACP countries involved in the negotiations called for a stabilization scheme that would contain an indexation of primary products to the prices of industrial products in whose manufacture their products formed an important ingredient. In this way it was hoped that the stabilization scheme could guarantee to their main products stable, equitable and remunerative prices in the EEC markets. If this proposal had succeeded, the resulting scheme would not only have been instrumental in increasing the export earnings of the ACP countries but could also have played a significant role in counteracting

38. HMSO, Report of the imperial economic conference (Ottawa) 1932, Cmd. 4174; and the report of the Commonwealth trade and economic conference (Montreal) 1958, Cmd. 539.

any global deterioration in the terms of trade of primary products. The EEC however, rejected this pnoposal perhaps due to its desire to maintain these countries as a cheap source for its industrial raw materials.

The second major issue in the negotiations for a commodity stabilization scheme under the Lomé convention related to the products to be included in the scheme, since the EEC had made it clear that it was firmly opposed to the inclusion of minerals into the scheme.[39] Minerals are regarded by the EEC as sensitive products due to their industries' heavy dependence on them. The Community therefore believes that any measures aimed at the stabilization of earnings from these products must be approached on a global basis. But even in the case of agricultural products which the community agreed in principle that they should be covered by the scheme, four criteria were agreed upon which in fact worked to exclude some agricultural products from the scheme. The four criteria agreed upon required that for any agricultural products of the ACP states to qualify for the scheme, they must be shown first, to be of significant importance to the employment problems of the country producing it; secondly, that such a product must be responsible for the deterioriation of that country's terms of trade; thirdly, that the receipts from such a product must be shown to be traditionally unstable owing to fluctuations in prices and/or quantities; and finally the level of dependence on the product by the ACP state concern

39. This opposition has been recorded in a declaration of the Community annexed to the minutes of the negotiations leading to Lomé II.

must be high.[40]

With the rejection of the issue of indexation, the criteria for the selection of products to be covered by the scheme became of crucial importance to all ACP states. These criteria were very important because they determined what products were to benefit from the scheme and consequently which ACP countries were to benefit. Using this criteria, a list of twelve products - all of which with the exception of iron ore, were agricultural products, was compiled. Under the second Lome convention however, the scope of the STABEX scheme has been extended to cover additional products, and the list now exceeds 44 products although iron ore remains the only mineral covered by STABEX.[41]

(a) Product coverage

STABEX under the current Lome convention covers only those products specified in Article 17, and which products were selected using the criteria discussed above. The products covered are divided into twelve categories namely, groundnut products, cocoa products, coffee products, coconut products, palm nut and kernel products, raw hides and skins, wood products, fresh bananas, tea, raw sisal, and iron ore. None of the products covered in this short list of any relevance to Zambia which exports mainly copper.

---

40. For a further discussion on these criteria, see "ACP-EEC Ministerial conference", The Courier, No. 3, special issue, March 1975.

41. *Ibid.* note 28.

The exclusion of minerals from STABEX reflects the Community's concern with the security of mineral supplies from the ACP states. This concern had become apparent beginning in the 1960s when there was a marked decline in European investment in mining ventures in the developing countries.[42] This same concern explains the innovation in the second Lome convention - the so called MINEX (or SYSMIN) which is directed towards maintaining the production of minerals in the ACP states for the European markets rather than the stabilization of the export earnings of those countries who depend on the export of the minerals. MINEX will be discussed later on in the chapter.

The exclusion of a number of products upon which certain countries' economies depend to a large extent does in fact exclude such countries from the benefits of the scheme. The position of the ACP countries excluded from the STABEX scheme is summed up well by the President of Zambia Dr. Kaunda, when asked to give his country's views of STABEX. In his reply he stated that:

> "... in terms of the new negotiations, we are very much interested in the STABEX scheme. We would like countries like Zambia, who produce minerals like copper and so on, to be considered in the same way as those who produce agricultural products. After all we are also developing and for minerals we sometimes have prices which fall, as is the case now, so we need assistance." 43

Thus although STABEX is aimed at ensuring stability of the ACP countries' export earnings from commodities upon which their economies depend, the exclusion of minerals raises

42. For a detailed discussion on the decline see Alain Dangeard, "European mining investment in the developing countries", The Courier, no.49, May-June 1978 at p.59.

43. See above, note 40.

doubts on the value of such a scheme vis-a-vis mineral export dependent countries like Zambia.

Provision is made under the current convention for the inclusion of more products into the scheme if a request was made by one or more ACP states.[44] But this provision does not seem to be easily implemented because the final decision to include or exclude a product vests in the EEC council of Ministers. The difficulty of implementing this provision, particularly in relation to minerals became apparent in the first year of the life of the first Lomé convention. The Council of Ministers of the ACP countries meeting in Fiji, decided to invoke the provision and seek the inclusion into STABEX of among other products, phosphates and copper.[45] In response to this request, the EEC Council of Ministers advised against the extension of the list of products particularly with minerals because it claimed that such an extension might go far beyond the possibilities offered by the convention. This clearly indicates that STABEX is not meant to cater for mineral exporting ACP countries, and hence the introduction of a new scheme in the second Lomé convention.

For those countries whose products are covered under the scheme, another hurdle has to be cleared before financial support can be made available to them. Like in the case of the IMF compensatory financing scheme discussed in chapter five, finances under the STABEX scheme are not automatically

---

44. Article 26 of Lomé II and Article 17(3) of Lomé I.

45. Annual Report of the ACP-EEC Council of Ministers, April 1, 1976 - March 31, 1977, p.31.

made available to a country suffering export earnings instability. A number of conditions have to be satisfied before finances can be made available.

(b) <u>A non-automatic approach:</u>

<u>STABEX provisions in Lome II</u>

The Lomé convention, like any other treaty is a result of a contractual act. This means that the countries whose products are covered under STABEX are assured of financial aid in times when their export earnings suffer due to specified problems and under the conditions set in the convention. These conditions are not subject to revocation or modification for the duration of the convention unless of course the whole convention is denounced by either the Community in respect of all ACP states or by individual ACP states.[46]

The provisions of the current Lomé convention dealing with STABEX prescribe a number of conditions upon which an ACP country whose export commodity qualifies under the scheme, can claim compensation. Among the important conditions are the so called "originating and destination" condition, "the dependency threshold", and "the trigger or fluctuation threshold."

(c) <u>Originating and destination requirement</u>

Products which qualify under the scheme and upon which an ACP country may seek compensation must first of all be shown to originate in that country and that its final

46. Lomé II, Article 189.

destination would be the EEC market, either for purposes of home consumption there or brought in the EEC under inward processing arrangements.[47] The effect of this condition is to limit the application of the scheme to only that portion of the listed products which is traded between the ACP country concerned and the EEC. Thus for compensation to be effected the instability in the export earnings must be shown to be a result of the instability in that portion of the product that enters the EEC markets. The deterioration in terms of trade arising as a result of trade between the ACP country seeking compensation and third countries, in relation to the listed products, does not count for purposes of compensation. It should be pointed out that this requirement is only fair to the Community because there can be no reason to justify using the EEC to compensate for the deterioration of an ACP's export earnings resulting from such a country's trade relations with other countries outside the framework of the convention.

(d) Dependence threshold

The level of dependence of the ACP states' economies on the listed products is required by the convention to be expressed by fixing what is known as a "dependence threshold". For a given product to qualify for stabilization funds in any given year, earnings from that product to all destinations must have represented at least 6.5 per cent of total exports of that country in the preceding year.[48] This dependence

47. *Ibid.*, Article 30(1).

48. Article 46 para 3 allows for a waiver from the destination requirement for landlocked, least developed and island countries.

threshold is reduced in relation to one product, sisal, to 5 per cent and in relation to least developed countries, landlocked and island states to 2 per cent.[49] This constitutes an improvement on Lome I which had set the dependence threshold at least 7.5 per cent of total exports, 5 per cent for sisal and 2.5 per cent for the least developed landlocked and island countries.

Since these dependence thresholds are recalculated each year they tend to reflect as closely as possible the economic realities in the ACP countries concerned. In fact the EEC considers such an annual recalculation as providing

> "a photograph of the trend of the economy of the product concerned in the general economic trend of each country." 50

If copper was included in the list of products covered by STABEX, Zambia could amost certainly have qualified for stabilization funds because its dependence threshold is always well over 90 per cent. In the case of Zaire which is the only other major ACP exporter of copper to the EEC, its dependence on copper exports has over the years been well over 50 per cent of its total exports.[51] This fact coupled with the traditional fluctuations of copper prices on the world markets would appear to have exerted a lot of influence on the decision of the EEC to exclude it from the scope of STABEX. This heavy dependence on the exports of copper by the two countries, and frequent fluctuation of

---

49. Lomé II, article 29.

50. EC Commission, information directorate-general, "The Lome convention-stabilization of export earnings", Doc. 94/75-202/X/75-E, page 10.

51. Data extracted from IBRD, Commodity trade and price trends, 1975, Washington.

copper prices on the world markets would have meant that the two countries could have been entitled to draw funds well beyond what has been earmarked for the entire STABEX scheme.[52]

(e) Trigger or fluctuation threshold

The last condition that has to be satisfied before funds can be made available requires that the actual receipts in a given year should not only be above the dependence threshold, but that the earnings reference level based on a four year moving average must be calculated.[53] For the scheme to be activated therefore, earnings from a listed product in the year of request must be shown to be at least 6.5 per cent below the reference level.[54] For the landlocked and island countries the trigger threshold is required to be at least 2 per cent.

Again this requirement would seem to explain the exclusion of minerals like copper from this scheme. The main exporters of copper to the EEC for example, are Zambia and Zaire both of which are landlocked. Under Article 47 of the convention the trigger threshold for these countries is fixed at 2 per cent. That is to say, if their earnings from copper exports to all destinations in any given year were to show a decline of at least 2 per cent below the four year average (the reference level), the scheme would be activated and they would be entitled

---

52. The second Lomé convention allocates only 550 million European Units of Account to cover all commitments under STABEX for the duration of the convention.

53. Article 36 of Lomé II. In certain conditions a three year moving average is uded (article 36 para 3).

54. Article 37, Lomé II.

to request for compensation. Due to the nature of international markets for copper, the earnings of these countries fluctuate very rapidly as their experience in the past few years have shown. In each of the years since 1975 the level of their earnings has declined well below the average of the previous four years. In this respect these countries could have been entitled to seek compensation almost every year. But the scheme does not seem to have been designed to provide compensation so frequently rather it was designed to help ACP countries in difficulties due to exceptional circumstances. The fluctuation in copper prices does not appear to be an exceptional circumstance due to its frequency.

(ii) Final remarks on STABEX

Although STABEX is considered by many to reflect the current thinking about the world commodity problems, some of its provisions cannot escape criticism.

The product coverage provisions of the scheme exclude many products comprising a large percentage of the ACP states export merchandise. Very notable among the excluded products are minerals like copper upon which at least two ACP countries depend almost entirely for their export earnings. The convention allows an expansion of the product coverage, but the implementation of these provisions is hampered by the differences in thinking between the EEC and the ACP states. While the ACP states might wish to see a more general scheme on the line of the IMF scheme,[55] the

55. , The Courier, no.33, Sept.-Octob. 1975, page 18.

EEC appears to favour a more limited approach.[56]

STABEX applies to the selected primary commodities released for home use in the EEC or brought under the inward processing arrangements in the EEC in order to be processed. Had a product like copper been included, the scheme would have provided an incentive for countries like Zambia to concentrate on the export of raw copper at the expense of diversification into copper processing industries. In this way STABEX appears to be a device aimed at perpetuating the raw material supplying role of the ACP states.

STABEX unfortunately, does not tackle the main problem facing commodity producing countries, that of raising the prices for these commodities but merely offers to stabilize export receipts for certain products. In offering to stabilize export receipts, the scheme merely offers a short-term solution to the commodity problem. This arrangement does not in any way seek to interfere with the functioning of the international market mechanism governing trade in the various commodities it covers.

Despite these shortcomings of the scheme, it appears to be a useful beginning towards the implementation of the new international order for commodities. A similar scheme for minerals could spread the advantages of the mineral export oriented countries.

---

56. ACP-EEC, Interim committee report 1975, pp.15-18, and report of the first ACP-EEC Council of Ministers meeting, Brussels, July 14-15, 1976.

VII. The Mineral Export stabilization Scheme (MINEX) under Lomé II

The main new feature of the current Lome convention and which bears considerable significance to the commodity problem as it affects Zambia, is MINEX. The creation of MINEX was a result of the realization by both the EEC and the ACP countries, that the very existence of mining production in these countries could be threatened by particular unfavourable circumstances such as those that have already been seen in Zambia and Zaire. Furthermore, it had been realized that STABEX was ill-suited to mineral production, the problems of which are very different from that of agricultural products. It is because of these reasons that the second Lome convention contains a new title (title III) in which an intervention system for minerals is embodied.

The character of this scheme depends on the specific way in which minerals differ from other commodities. The key element is the maintenance of a certain level of production capacity for mineral dependent ACP countries rather than the stabilization of earnings from such products. The main reason for this approach lies in the character of international mineral markets which are prone to cyclical variations of a considerable magnitude, resulting from the great sensitivity of this sector to industrial change. By this token, the idea in MINEX is not to maintain volumes of production at all costs, as this is only likely to increase the imbalance between supply and demand on the world markets and keep prices low and therefore low export earnings for producer countries. What MINEX aims to do on the contrary is to keep production of export capacity at a realistic level, so that the countries concerned can take greater advantage of a recovery when the balance of the market is restored. This realistic production capacity may be affected by a number of events such as mining accidents, internal and external political upheavals and by economic depression in the industrialized countries. MINEX aims at intervening to restore the production capacity in the event of these circumstances taking place.

Although the character of the international mineral markets necessitated a new approach in the Lomé convention, the nature of the scheme appears first and foremost to have been designed to assure the EEC of a continuous source of industrial raw materials. The EEC as pointed out earlier in the chapter has for sometime been bothered by its degree of dependence on minerals in the ACP states. Zambia and Zaire for example, provide a third of the EEC needs in copper.[57] Instability in the production of copper in these two countries therefore could have a great impact on the industrial production in the EEC. The EEC apprehension has been made worse by the realization that its investments in Africa's mines have declined considerably since the 1960s.[58]

---

57. South magazine, January, 1982, "Bringing minerals into Lomé", page III.

58. Direct investment in developing countries fell from US 2.4 billion dollars in 1970 to around US 2 billion dollars in 1977.

(i) Product coverage

MINEX or SYSMIN as it is sometimes referred to, identifies eight minerals for inclusion in the scheme. These minerals are considered to be of the greatest significance to the economies of the ACP mineral producing countries. Minerals included in the scheme are copper and cobalt (produced by Zambia, Zaire and Papua New Guinea), phosphates (Togo and Senegal), bauxite and Alumina (Guinea, Jamaica, Surinam and Guyana), Manganese (Gabon), tin (Rwanda) and iron ore pellets (Mauritania and Liberia).[59] The convention provides a mechanism for extending the product coverage of the scheme during the life of the convention by a decision of the ACP-EEC Council of Ministers if it turns out that other products of importance to the ACP states' economies are being seriously disturbed.[60] This constitutes an improvement on the provision contained in the STABEX scheme under Lomé I. In that convention, the list of products covered could be extended by a decision of the EEC council of ministers with no significant part being played by the ACP states in the formulation of the decision.

All the products covered under the scheme constitute a significant dependence threshold for the countries that produce them. Taking the example of the mineral we are concerned with in this thesis, copper, the general trend may be appreciated. Three countries export copper to the EEC markets: Zambia, Zaire, and Papua New Guinea. The

---

59. See article 50 of Lomé II.
60. Ibid.

dependence threshold for these countries on copper is 91 per cent for Zambia, 55 for Zaire, and 51.7 for New Guinea.[61] It is significant that the scheme includes copper because international negotiations aimed at stabilization of copper prices have not achieved many results so far. This scheme therefore, may be seen as constituting a first step towards the realization of the ambitions expressed in the new international economic order in relation to primary commodities.

(ii) <u>A non-automatic approach to the use of funds in SYSMIN</u>

The scheme is backed by financing amounting to 280 million European units of account (about 372 million dollars) for the entire duration of the convention.[62] It should be noted that these funds are limited and are unlikely to have a substantial impact on the stabilization of the export earnings of the countries concerned. This is particularly obvious when one considers that the amount is to be divided equally for the five years the convention will be in force.

Considering the limited funds under the scheme, it is impossible to apply an automatic approach in the use of the funds without risking over concentration of aid to one product or indeed to one country. Furthermore since minerals and mineral production tend to involve sophisticated multi-

61. The Courier, no.58, special issue, Nov. 1979, page 30.
62. Article 51 of Lomé II.

national corporations, an automatic approach to the use of the funds might run a further risk of diverting the aid in favour of such corporations. To avoid both these problems, the scheme has got a number of special devices.

As in the case of STABEX, the scheme has a dependence threshold which requires the Community to provide assistance only when the mineral concerned has accounted over the preceding four years for at least 15 per cent of the total export earnings to all destinations. For the least developed and landlocked states the threshold is reduced to 10 per cent.[63]

In addition the ACP state concerned must show that its production capacity or capacity for export to the EEC of this mineral is liable to be reduced substantially to an extent which is likely to seriously affect its own development strategy. A substantial fall in production or export capacity is taken to mean a fall of at least 10 per cent.

The third condition to be met is that the fall in production capacity or capacity to export must be shown to be beyond the ACP country's control. This condition therefore, covers circumstances such as political instability in and outside the country, price collapse on the international market, and other economic mishaps. It is hard to envisage any situation that might affect the export earnings of a mineral exporting ACP country that would not

63. Article 53 of Lomé II.

qualify under the condition. In this respect the scheme is triggered in almost all the instances which adversely affect the export earnings of these countries.

In the case of Zambia, it is clear that its dependence threshold is well above the 10 per cent required of a land-locked country under Article 53 of the convention. In fact its dependence threshold has consistently been above 90 per cent. The export earnings instability it has been experiencing is recent years has been a result of circumstances well beyond its control. These circumstances have included the drop in copper prices on the world markets and transportation problems which have affected its production capacity and its capacity to export the mineral. From the beginning therefore Zambia has qualified for assistance under the scheme. The problem which has to be underlined however, by contrast with STABEX, the funds in SYSMIN are very limited and are aimed at restoring the production capacity and capacity to export. The scheme does nothing to stabilize the prices of copper which would seem to be the main concern of a country like Zambia. For if the funds Zambia is able to draw now from the scheme finally help it to restore its production capacity and capacity to export, then the country will be able to produce at full capacity. But if with full capacity of production the export of copper still fetch a low price or fetch an even lower price than now and Zambia finds itself in serious financial difficulties, it will not be entitled to any assistance under SYSMIN. It is this difficulty that distinguishes this scheme from STABEX. What Zambia needs is assistance to enable it cope with the economic effects of fluctuations in export earnings. It is submitted here that the provisions of SYSMIN do not meet this need adequately. For Zambia, the success of SYSMIN in restoring production capacity of the copper mining industry would only mean an increased copper supply on the world markets that would only reduce the prices it fetches.

(iii) Concluding remarks on SYSMIN

The Lomé provisions on SYSMIN are designed to rehabilitate mining industries in ACP countries that encounter troubles due to certain special reasons. The essential criterion for assistance is that physical capacity to produce minerals or export them to the EEC must have declined substantially. The provisions do not address themselves to the basic need of these countries, which need assistance to cope with the resulting economic hardships from reduced export earnings. In this regard SYSMIN appears to be a scheme that works to the advantage of the EEC in its attempt to secure cheap supplies of various minerals from the ACP countries.

It is submitted that, the entire scheme needs re-examination with a view of widening its provisions to take into account the economic effects of instability in export earnings from mineral products. It is hoped that in the negotiations for the next Lomé convention this issue will be considered seriously and a solution worked out. A scheme that guarantees certain levels of prices for ACP countries' minerals would be something that ought to be considered in any future arrangements.

In the two occasions when Zambia utilized the scheme, it became apparent that the funds made available to it were to be used for a programme aimed at the rehabilitation of the copper industry and not to rejuvinate all aspects of the economy. The first use of the scheme involved the sum of 55 million European Units of account. This amount was to be used to finance projects aimed at the stabilization of capacity and production by the mining industry. The projects that were to be financed in this case were the replacement of outdated mining equipment, introduction of new processing methods and the improvement of existing ones, and to improve safety standards.

All the projects financed under this arrangement were therefore not aimed at alleviating general economic problems facing Zambia as a result of unstable copper prices but to ensure that she is capable of maintaining a level of production that would satisfy the import needs of the countries in the European community.

Even in this limited aspect, however, the SYSMIN facility was inadequate to finance the three projects mentioned above and that meant that the Zambian government had to provide the balance. The total cost of the projects was estimated to be 85,346,000 European Units of Account and the funds which were made available to Zambia from SYSMIN was only 55 million Units of Account to be paid back over a forty year period with a ten year grace period, and at the rate of 1 percent interest.

Since the completion of this chapter, the third Lome Convention has been signed. This agreement continues the SYSMIN scheme and makes no changes in the rules governing the use of the scheme. This obviously means that the problems arising out of the second Lomé Convention may continue to be encountered in the third Lomé Convention.

CHAPTER NINE

SOUTHERN AFRICAN CO-OPERATION IN MINERAL MARKETING: PROBLEMS AND PROSPECTS

In the last chapters various measures for the stabilization of copper prices have been discussed. In the discussions, it became clear that these measures have attained limited success. The compensatory financing of export earnings schemes in the IMF and under the Lome Convention do provide some relief towards alleviating problems arising as a result of copper price fluctuations. The commodity agreement approach to copper price fluctuations has proved unsuccessful mainly due to the breakdown in the negotiations for the conclusion of such an agreement. The producer association approach has been attempted through CIPEC which however has had very limited success in the stabilization of copper prices. Its success has been limited to fostering solidarity of copper producers and co-ordinating of marketing policies and sharing of information regarding marketing of copper.

The limited success obtained through these various approaches to price and export earnings stabilization calls for a different approach to the problem.

This chapter discusses a regional approach. The approach seeks to tackle the problems through the creation of regional marketing corporations by developing countries. Through such corporations it is hoped that copper producing countries may be able to improve their bargaining position on marketing institutions such as the LME. Through an improved bargaining position on the LME the producers may be in a position to influence prices. This coupled with the other measures discussed in earlier chapters may substantially alter the influence these institutions have on the determination of commodity prices.

The discussion in this chapter centres on the problems and prospects for the use of this approach in the Southern African sub region and their legal implications. For this approach to be of value to Zambia which depends on exports of one main mineral, it must involve minerals.

I. Is there compatibility in the mineral marketing arrangements in Southern Africa?

One of the obvious points regarding mineral marketing in Southern Africa is the lack of a common approach. Each country appears to approach the issue of the marketing of minerals from a different angle. Out of this duplicity of approaches, two broad categories of marketing arrangements can be identified.

The first category involves the use of state controlled marketing corporations and the second category involves the use of mining companies. Of the nine member countries in the Southern African Co-ordinating Conference (SADCC),[1] five employ the first category of marketing arrangements. These

---

1. SADCC is the latest attempt at sub-regional economic co-operation in the South African sub region. SADCC is discussed fully later in the chapter.

are Zambia, Zimbabwe, Tanzania, Mozambique, and Angola. The remaining four countries, that is, Lesotho, Swaziland, Malawi and Botswana employ the second approach.

The first approach involves the creation of a national mineral marketing corporation charged with the responsibility of marketing of all minerals produced in the relevant country. What has differed from country to country has been the way such corporations have been created and organized. In some countries, the corporations have been constituted through the employment of normal company law statutes existing in those countries while in other countries specific statutes have been enacted with the sole intention of instituting such corporations. Zambia employed its existing company laws to establish the Metal Marketing Corporation of Zambia Ltd. How this was achieved has already been discussed in Chapter Three of this thesis. Zimbabwe has used a similar approach by setting up a statutory mineral marketing corporation. The corporation was constituted by the Mineral Marketing Corporation of Zimbabwe Act of 1982. The Act makes the corporation the sole marketing and selling agent for all minerals produced in that country, whether produced by private enterprises or by state owned enterprises.[2]

The Zimbabwe mineral marketing corporation is unique in employing agricultural marketing strategies to minerals. Like the agricultural marketing boards created during the

2. Section 20 of the Zimbabwe Mineral Marketing Corporation Act of 1982.

period of the Central African Federation, the corporation has power to purchase minerals from intending exporters for its own account and export them as though they were produced by the corporation itself.[3] Should the corporation not wish to do this, it may undertake to negotiate sales contracts on behalf of the exporter in return for a fee or commission or merely authorize the producer to export the mineral or minerals subject to certain conditions it may set.[4]

The significance of the Zimbabwe minerals marketing Act therefore is that by the use of legislative powers, the government in that country created a statutory body charged with the responsibility of marketing all minerals in Zimbabwe. Governmental control of this body is portrayed in the machinery created under the Act to run the activities of the corporation.

The Act creates a mineral marketing board which is to be the sole authority through which all minerals in Zimbabwe are to be marketed.[5] The control of this board lies firmly in the hands of the government which exercises it in three ways.

First, the government is empowered under Section 5 of the Act, to appoint the Chairman of the board. Under the terms of this section, the chairman of the board is to be appointed by the Minister responsible for the mining industry. Below the Chairman, there is the General Manager responsible for the day to day running of the corporation

---

3. Ibid., section 20(c).
4. Ibid., sections 42 and 43.
5. Ibid., Section 4.

who the Act requires to be nominated by the Minister. The power to nominate the General Manager is clearly aimed at giving the government substantial control not only in the boardroom but over the daily administration of the corporation.

Secondly, the control of the activities of the corporation is exercised by the government through the power to appoint the remaining seven members of the board. Section 24 of the Act requires two of the seven members to be appointed by the Minister after consultation with the chamber of mines, one after consultation with trade unions which in the opinion of the Minister represent the majority of mine workers, two in consultation with ministries related to marketing, export or sale of minerals, and the last two for their knowledge and experience in fields of mineral production or international commodity marketing.

Finally, the government exercises general control over the affairs of the corporation through powers assigned to the Minister under section 25. This section empowers the Minister to give directions in writing, of a general character relating to the exercise by the corporations of its functions, duties and powers as appears necessary to the Minister taking into account not only the interests of Zimbabwe but also those of other mineral producers. Whenever the Minister chooses to make such directives, the corporation is required to comply without undue delay.[6]

---

6. Ibid., section 25.

These measures of control seek to ensure that the Corporation pursues marketing policies that reflect the overall policies of the Zimbabwean government and also to ensure that the activities of the corporation are subjected to public accountability.[7]

One interesting aspect of the Zimbabwe mineral marketing arrangements is that since the corporation and its board are firmly controlled by the government, one would expect it to safeguard the interests of the Zimbabwe mining industry only. The mineral marketing corporation of Zimbabwe Act however does require in addition that the corporation in performing any of its assigned duties and functions to take into account the common interests of all producers of minerals.[8] This regard for the interests of other mineral producers certainly creates a conducive atmosphere for the co-ordination of mineral marketing strategies on a regional basis.

The second approach to the marketing of minerals in Southern Africa is undertaken through the use of the ordinary mining laws. Examples of countries employing this approach are Malawi and Botswana.

The Malawi Mines and Minerals Act of 1981, requires all exporters of minerals in that country to obtain a permit from the Minister responsible. In this respect the Act states that,

---

7. Ibid., section 23(3).

8. Ibid., section 22(a)(iii).

> "the Minister may grant to any person a permit to export minerals from Malawi on conditions determined by the Minister and specified in the permit; but the grant of such a permit does not exempt the person concerned from complying with the requirements of any law relating to the export of minerals."[9]

This provision of the Act gives both local and foreign mining enterprises in Malawi the right to directly market the minerals they produce as long as they obtain a permit to do so from the Minister responsible. The requirement of a permit would seem to be designed at assuring governmental control of the marketing policies of the mining enterprises since unacceptable marketing arrangements by such enterprises could lead to the refusal of a permit.

A similar approach is employed by Botswana. In this country, a mining lease is normally granted to both nationals and foreign mining companies that are incorporated in the country or can establish a domicilium citandi et executandi in the country.[10] For a grant of a mining lease to be considered however, the applicant company or individual must provide the granting authority with relevant information regarding his or its marketing arrangements for the mineral which is subject of the lease.[11] It can be assumed from this requirement that without the applicant providing satisfactory information as to the marketing arrangements, the mining lease may not be granted. But even where satisfactory information is provided regarding the marketing arrangements and a mining lease is granted the government

---

9. The Mines and Minerals Act of Malawi, 1981, section 119.

10. Mines and Minerals Act of Botswana, Act no.30 of 1976, Section 5(b).

11. Ibid., section 32 paragraph j(vi).

is at liberty to include in the lease conditions relating to the processing, disposal and the sale of the minerals to be produced. In effect therefore, the government at all times has the final control in the manner in which such minerals are marketed.[12]

The two approaches to the marketing of minerals employed by countries in Southern Africa reveal one important issue which may help the co-ordination of mineral marketing arrangements in the sub-region. This issue is the governmental control of such arrangements. Thus although some countries have established statutory bodies to undertake the marketing of minerals and others have relied on the mining laws to achieve the same objective, both approaches give the governments concerned the ultimate control over the issue. This being the case, co-ordination of the mineral marketing arrangements can proceed on a governmental level. The problem is one of how this governmental co-ordination of the marketing strategy is to take place. Historically, there are a number of approaches some of the countries had tried to employ in co-ordinating policies in the sub region regarding a number of issues which may prove valuable in any attempts at the co-ordination of marketing arrangements. These attempts and the problems encountered are discussed below. The discussion below seeks to highlight the problems encountered in these attempts and how they can be overcome.

12. Ibid., section 35.

II. Co-ordination of economic policies in Southern Africa: A historical perspective

(i) The Central African Federation

The Central African Federation was created in 1953 and brought together three countries in the sub-region, that is to say, present day Malawi, Zambia, and Zimbabwe.[13] This federation involved complex legal arrangements aimed at fostering intra-territorial co-operation in a number of economic and social fields.

As far as trade was concerned, intra-territorial co-operation was to be attained through the creation of a common market with a common external tariff to apply in relation to the constituent member territories on the one hand and their other trading partners on the other.[14]

The second aspect of the federal arrangement involved the running of joint services, such as railways and air transportation. Some of these joint services had existed prior to the creation of the Federation but were run purely on a consultative basis by the Central African Council. It was in fact due to the experiences of this Council that the federal arrangements included the running of joint services. In the years in which this Council had run joint services, it had come to the conclusion that consultation on its own could not secure a harmonious and effective programme for the territorial co-ordination of

---

13. See Order in Council, Statutory Instruments no.1199 of 1950.

14. See Sir Roy Welensky, "Federation of Rhodesia and Nyasaland", in F.S. Joelson (ed.), Rhodesia and East Africa, 1958, pages 11-20.

the services involved.[15] The Council formed the opinion that the inhabitants of the three territories stood to benefit more through the creation of central authorities which could independently make decisions that were beneficial to the interests of all the countries involved.

The second aspect of the federal arrangement makes it clear that it was not created to foster a complete integration of the three territories but rather to encourage the centralization of joint economic and social interests. One of the notable spheres of economic interest to the three countries which was left out of this centralization policy was mining.

In this respect the legal scheme for the federation made provision for the sharing of legislative power between the federal legislature and the territorial legislatures. Certain matters were left to the exclusive jurisdiction of the federal legislature while other matters were left to the exclusive domain of the territorial legislatures. All matters relating to mining were left to the jurisdiction of individual territorial legislatures. The shaping of mining policies was therefore an area which was outside the centralized scheme of the federation. Territorial responsibility however, did not rule out the possibility of the three territories co-ordinating their mineral marketing policies. Indeed as early as 1939, the Rhodesia-Nyasaland Royal Commission had observed that the improvement

15. HMSO, Southern Rhodesia, Northern Rhodesia, Nyasaland. Report by the Conference on Federation held in London, January 1953, Command 8753.

of the quality of various products in the three countries as well as the methods of marketing and cultivation of new markets would benefit from closer co-operation.[16]

(a) Co-ordination of marketing arrangements

Co-ordination of marketing arrangements in the federation were undertaken through federal legislation but were limited to agricultural commodities. This limitation stemmed from the fact that minerals were excluded from the federal sphere of competence. Regarding agricultural commodities, the federal legislature created a number of marketing authorities which controlled the marketing of such commodities.

In 1955 for example, the Federal Legislative Assembly passed the tobacco marketing Act[17] which provided for the control of the export of tobacco from the federation. This Act provided among other things that,

> "If in the opinion of the Minister the quantity of tobacco produced in the Rhodesias will be in excess of the anticipated requirements of the markets, he may, after consultation with the buyers association and growers association, and such other tobacco organizations in Great Britain and other major tobacco purchasing countries as he thinks fit to consult, prescribe
> (a) total weight that may be sold in the Rhodesias or exported."

Similarly in 1957 the Federal Legislative Assembly passed an Act establishing the grain marketing board.[18] One of the important powers vested in the board was the power to import and export all types of grains as it considered necessary in the interest of the federation.[19]

16. HMSO, Rhodesia-Nyasaland Royal Commission. (1939), page 131, paragraph 316.

17. Federation of Rhodesia and Nyasaland Act no.5 of 1955.

18. Federation of Rhodesia and Nyasaland Act no.23 of 1957.

19. Ibid., section 10.

This power was later extended to cover all agricultural products.[20]

A similar arrangement existed in relation to beef and other meats. The cold storage commision Act of 1960 established a Commission that was to be responsible for the operation of all abattoirs, refrigeration of meats, and the control of the export of chilled and frozen meats from the federation.[21]

The statutory boards created by the Federal Legislative Council were all required to use one type of mechanism to stabilize the income of the producers in the federation. The mechanism employed was one of creating stabilization funds for the commodities involved. These funds were to be used in minimizing the effects of price fluctuations on the producers. Whenever prices were good on the world markets, the surplus received was put into a fund that was to be used to boost the prices paid to producers in the federation in the event of prices decline on world markets. For example section 17 of the Grain marketing Board Act, provided that,

> "where there is in the opinion of the Minister an amount of money in the equalization fund surplus to the amount necessary for the purpose of the fund, he may take such surplus amount into consideration in determining the price to be fixed by him thereafter or may pay directly higher prices to producers."

The control of marketing arrangements through common institutions may have been possible in the federation

---

20. See Federation of Rhodesia and Nyasaland Act no.18 of 1957.

21. Section 37 of the Federation of Rhodesia and Nyasaland Act no.9 of 1960.

simply because of the existence of the federation which employed the same laws for all the three territories. The use of this approach in countries whose laws are not harmonized through a federal system such as is the case in Southern Africa is bound to encounter a number of problems.

One of the major problems would involve the creation of such boards since they can only be created by legislation and each country in Southern Africa has its own independent legislative machinery. These legislative machineries may not be empowered to pass laws affecting marketing arrangements of other countries in the sub-region.

(b) Co-ordination through joint authorities

Another interesting aspect of the Rhodesia and Nyasaland federation and which may prove a useful experience upon which countries in the Southern African sub-region may draw in an attempt at co-ordinating of mineral marketing arrangements relates to the federal authorities.

During the existence of the federation, a number of joint authorities had been established. Examples of such boards were the federal power board established under section 19 of the federal electricity Act of 1956; the Central African Airways corporation established under the Central African Airways Corporation Act of 1960; and the Agricultural Research Council of Rhodesia and Nyasaland established under section 18 of the federal research Council Act of 1959. A similar arrangement existed for the running of the Rhodesia railways.

These joint authorities were created as a result of an act of political union between the three members in the federation. This political union within the federation made it possible for the creation of joint authorities to supervise or run services of joint interest to the three countries. Without this political union, the joint authorities in the federation may not have been possible. Even if they were to exist they probably would have taken a different form. Thus the use of this approach in marketing of minerals in Southern Africa would depend very much on whether some form of a political union can be possible between the countries. The prospects for such an act of political union do not appear to be bright or even desirable. This being the case, the use of some form of joint authority for the marketing of minerals in the sub-region may have to take a different form from the federal joint authorities. Indeed at the time when the federation was dissolved in 1963 a number of discussions took place regarding the possible continuation of some of the authorities. Some leaders in the countries strongly objected to the continuation of such joint authorities in a situation where a political union no longer existed. For example, President Kaunda of Zambia completely rejected the continuation of such joint authorities unless they were to function as purely commercial enterprises rather than as a result of any political union. It was on this understanding that the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council made provision for arrangements to continue the work of the power board that had existed under the federation and renamed the Central African power board.[22]

This experience with the federation of Rhodesia and Nyasaland joint authorities reveals one important lesson as far as the discussion in this chapter is concerned. For such an approach to be applicable to the situation in present day Southern Africa, it should be preceeded by some act of a political union. If such a political union were to be possible, then use of the federal or union legislative power could be made in creating joint authorities in the marketing of minerals. Since such a union is unlikely to exist and perhaps even undesirable, this approach may not seem to hold much prospect for countries in Southern Africa. In this respect there is much to be learnt from the experience of the three East African countries, that is, kenya, Tanzania, and Uganda. These countries had for some years run joint services in various fields such as air transport, railways and harbours. These joint services were however dissolved when the East African Community which provided the political nexus collapsed.

(ii) Economic Community of Eastern Africa

A more recent experiment in co-ordination of economic activities involving a number of southern African countries was made in the so called Economic Community of Eastern Africa. This should be distinguished from the East African

22. Dissolution Order in Council, Statutory instrument no. 2085 of 1963.

Community comprising Kenya, Uganda and Tanzania. The Economic Community of Eastern Africa was a brain child of the United Nations Economic Commission for Africa (ECA) and came into being as a result of the ECA's resolution 142 (VII) which had recommended the establishment, at the sub-regional level, of an intergovernmental machinery to be responsible for the harmonization of all economic and social matters.[23] Resulting from this resolution, a sub-regional meeting was held in Lusaka, Zambia between 26th October and 2nd November 1965. In attendance were representatives from Zaire, Zambia, Malawi, Burundi, Ethiopia, Kenya, Rwanda, Tanzania, Uganda, Mauritius and Rhosesia (now Zimbabwe).[24] One of the most important recommendations resulting from this meeting was that an economic community of Eastern Africa be established to co-ordinate economic and social development in the Eastern African sub-region.

In order to implement the above resolution, a meeting of the interim council of Ministers was held in Addis Ababa in May 1966 resulting in an agreement on the "terms of association". The "terms of association" were in effect a transitional agreement spelling out the means of co-operation between member states prior to the establishment

---

23. Economic Commission for Africa, resolution 142(VII) on economic integration, 22 February 1963. Published in UN, ECA Annual Report, 3rd March 1964 - 23rd February 1965. Offical records of ECOSOC, 39th session, supplement number 10/E/4004.

24. ECA; Report of the sub-region meeting on economic co-operation in Eastern Africa. Doc. CN.14/LU/ECO. P/12 of December 10, 1965.

of the community. The aims of the community were spelled out in this document. The most relevant aim for purposes of this discussion was contained in article 1 paragraph (c) which states the aim of the community as:

> "to contribute to the orderly expansion of trade between the member states and the rest of the world and, to this end, take measures which render their products relatively competitive with goods imported from outside the community, and to seek to obtain more favourable conditions for their products in the world market."25

It is clear from this aim that the community when created would have sought among other things to co-ordinate or harmonize its members' marketing policies so as to obtain more favourable conditions for their products on the world markets. The terms of association however, did not specify what legal methods would be used in this harmonization process. Perhaps this would have been specified in a later agreement formally creating the community, but as is now common knowledge, no such agreement was ever concluded. Efforts at creating such a community were shelved as various member countries were attracted to the ill fated East African Community.[26] What form the co-ordination of economic activities would have taken therefore, remains a matter of speculation.

It is perhaps fair however, to say that the Economic Community of Eastern Africa would have most likely have followed the pattern that has been followed in similar

---

25. See UN Document E/CN.14/352, annex V.

26. See Frank C. Ballance, Zambia and the East African Community. (1971) Syracuse, New York, p. 1.

circumstances elsewhere in Africa. In a number of other parts of Africa, sub-regional groups have been created through the conclusion of multilateral agreements which have had the effect of creating a customs union or a free trade area. Examples of such customs unions and free trade areas include the Central African Customs and Economic Union (UDEAC); Equatorial Customs Union (UDE); and the Economic Community of West African States (ECOWAS).

A customs union approach to economic co-operation, involves by its very nature, the substantial elimination of trade restrictions among the members involved and the creation of a common external tariff for them.[27] A free trade area on the other hand, requires the elimination of trade restrictions and duties on substantially all trade without necessarily establishing a common external tariff for its members.[28]

This approach to regional co-operation therefore seeks to facilitate intra-regional trade and pays little attention to the issue of regional co-ordination of marketing policies. Thus even if the Economic Community of Eastern Africa had successfully been established, there appears to be no reason to believe that it would have been a useful instrument for the co-ordination of marketing policies in the member countries in relation to consumers in the developed countries.

The models of inter state co-operation such as were employed in the federation of Rhodesia and Nyasaland, and

---

27. See Article XXIV paragraphs 8(a) of the GATT.
28. Article XXIV psragraph 8(b).

those employed under the GATT regional arrangements, that is to say, customs union and free trade areas may not be suitable for the co-ordination of mineral marketing policies in Southern Africa. The modalities of the federal arrangement did provide the machinery for such co-ordination but only in as far as their existed some form of a political union which unfortunately does not exist in Southern Africa. The GATT permitted regional arrangements on the other hand are not designed to provide a forum or machinery through which member countries can co-ordinate their marketing policies in as far as exerting some joint influence on international commodity markets is concerned. If these two approaches do not provide a suitable model for such co-ordination, the issue to be addressed below is as to whether there exists an alternative approach that may help establish this co-ordination.

III. SADCC and the co-ordination of mineral marketing policies

The Southern African Development Co-ordinating Conference (SADCC) is the most recent attempt in the sub-region at the co-ordination of economic and development activities. The origins of this association can be traced to acts of political solidarity in support of liberation movements in the area. These acts of political solidarity were first given form in the Lusaka manifesto in which the countries of East and Central Africa called for peaceful change in the still unliberated territories in Southern Africa, failure to which these countries pledged to support armed struggle. The acts of political solidarity were endorsed by the Organization of African Unity (OAU).[29]

The experience in co-ordinating political liberation in the area, opened up the possibility of using the same approach to economic matters. The immediate impetus for the emergency of SADCC came on 1 April 1980 when nine Southern African states signed the "Lusaka Declaration." The nine countries involved were: Angola, Mozambique, Zimbabwe, Botswana, Zambia, Swaziland, Malawi, Lesotho and Tanzania. The declaration appears to reflect a measure of scepticism regarding the effectiveness of the traditional GATT permitted regional arrangements namely, customs unions and preferential trade areas. It should be observed here that all the nine members of SADCC had had experience of one kind or another with the GATT permitted regional groupings. Malawi, Zambia, and Zimbabwe had until 1963 been grouped in the Federation of Rhodesia and Nyasaland; Mozambique and Angola came under the Portuguese colonial economic union; Swaziland, Lesotho and Botswana have for over seventy years been tied to the South African Customs Union; while Tanzania had the agonizing experience of belonging to the ill fated East African Community.

The experience of these countries in these colonial and colonial oriented regional economic groupings could seem to have created a desire for an innovative regional

---

29. The Lusaka manifesto was approved by the OAU on April 16, 1969 and adopted by the Assembly of heads of states and governments at Addis Ababa, 6-10 September 1969. For a full text see UN Doc. A/7754 (7th November 1969) at pages 2-9.

arrangement, devoid of legal complexities which had been a common feature in earlier arrangements. The new approach was to assume an informal posture. The informal nature of this new arrangement is clearly evident in the early meetings called to discuss the establishment of the new arrangement. The first meeting was an informal gathering of Foreign Ministers of the front line states who met in Botswana in May 1979 to discuss and devise a programme of action for the promotion of regional economic co-operation.[30] This was followed by another informal meeting generally referred to as SADCC I held at Arusha, Tanzania in July 1979 to discuss the programme of action, and later by an equally informal gathering of Heads of States and Governments in April 1980 in Lusaka. It was in Lusaka that the goals of SADCC were pronounced and a document known as the Lusaka declaration was released setting out the goals of the new regional arrangement. The goals identified in the declaration are:

(a) the reduction of economic dependence, particularly, but not only, on the Republic of South Africa;

(b) the forging of links to create a genuine and equitable regional integration;

(c) the mobilization of resources to promote the implementation of national, interstate and regional policies;

---

30. P.E. Slinn, "The Southern African Development Co-ordinating Conference." (1984) Yearbook of World Affairs, 183.

(d) concerted action to secure international co-operation within the framework of a strategy for economic liberation.[31]

(i) The legal status of SADDC

Although the origins of SADCC lie in informal acts of political and later economic co-operation between the Southern African States, a legal touch was given to the arrangement at its second summit meeting held in Salisbury (now Harare), Zimbabwe on 20 July 1981. At this meeting, the Heads of States and Governments signed a memorandum of understanding on the institutions of SADCC. According to this memorandum, SADCC institutions were to provide the machinery for regional consultation and decision making.[32]

Despite being termed a "memorandum of understanding", the instrument sets out clearly the agreement of the parties and creates certain obligations on the member states. This suggests that the instrument is an international agreement or treaty as defined by the Vienna Convention on the law of treaties. The Convention defines a treaty as,

> "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; ..."[33]

The SADCC memorandum of understanding though not as yet registered with the United Nations in accordance with

---

31. For the text of the Lusaka declaration, see Amon Nsekela, Towards Economic Liberation, London, (1981), page 2.

32. See Memorandum of understanding on the institutions of the SADCC. Record of the SADCC summit meeting, Harare, 20th July 1981, pages 32-36.

33. Article 2(a), The Vienna convention on the law of treaties, 1969.

article 102 of the United Nations Charter, is clearly an international treaty in so far as it is an international agreement entered into by nine states and governed by international law. The provisions of the memorandum leaves no doubt to the fact that the agreement is to be governed by international law. For example, article IX gives SADCC legal capacity in each member country necessary for it to carry on its functions. The granting of legal personality to SADCC in member countries follows an approach used in many other similar international arrangements governed by international law. Another example is article XI which seeks to ensure the international character of SADCC's Secretariat by prohibiting the Executive Secretary from seeking or receiving instructions from any member state. Furthermore, article XIII dealing with admission to membership sets out very similar conditions to those employed by many other international organizations governed by international law.

(ii) Some provisions of the "memorandum of understanding"

The text of the "memorandum of understanding" in addition to reciting the objectives as set out in the Lusaka declaration, provides for the creation of five institutions for SADCC. These are: the Summit (Article II); the Council (Article III); Sectoral Commissions (Article IV); and a Secretariat.

Article II makes it clear that the Summit consisting of the heads of states and governments, is to act as the main policy making organ responsible for mapping out the general direction SADCC should take. The Council on the other hand, is the executive organ of SADCC and is responsible for the implementation of the policies of the organization.

Of particular importance to the discussion in this chapter, is Article IV of the "memorandum of understanding" which authorises the summit to set up sectoral commissions to oversee various programmes of action undertaken by SADCC. Each such sectoral commission is to be governed by a convention to be adapted by the Council and ratified by member countries. Such conventions it would appear, are to be binding agreements between the member states and regisrable with the United Nations under article 102 of its charter. This approach makes it clear that co-ordination of the various economic policies in the sub-region would be undertaken through the medium of international conventions concluded between all the member states. So far this appears to have been followed in the case of the only fully operational sectoral commission to date, namely, the Southern African Transport and Communication Commission (SATCC) which is governed by a convention signed by all the member states. The advantage of this approach lies in the fact that a binding operational medium is provided in which the sectoral commission acts as a medium through which co-ordination, planning, and financing of identified policy decisions could be implemented by member states as opposed to the setting up of say an independent multi-national project.

In the priority field of transport and communications, SATCC was created by the Summit Conference in accordance with article IV of the "memorandum of understanding". SATCC is governed by a convention adopted by the Gaberone summit of July 1982 and which provides for the creation of three organs for SATCC, namely a committee of Ministers, a co-ordinating official committee, and a technical unit. It is through this SATCC machinery that the co-ordination of the sub-region's transport and communication policies would be worked out.

Regarding other spheres of economic life in the sub-region, the modalities of co-ordination of activities will have to be undertaken like in the case of SATCC by other sectoral commissions under appropriate sectoral conventions. The success of any of these sectoral conventions will therefore depend to a large extent on the nature of the sectoral conventions and the mechanisms provided in these conventions for the implementation of agreed policies.

(iii) The role of Sectoral Commissions

Since SADCC seeks basically to co-ordinate or consolidate and link development efforts across national boundaries, existing national plans, projects, and administrative structures as well as financial arrangements will continue to play an important role. In this respect, SADCC has first assigned to each country a role in initiating projects. These roles it would seem were assigned on the basis of work already done in that area by a particular country and that country's potential in the area. The roles assigned so far are:

Angola	-	Energy policies, land cultivation,
Botswana	-	Animal disease control, and the Secretariat
Lesotho	-	Land utilisation and soil conservation
Malawi	-	Fisheries and wildlife
Mozambique	-	Transport and communications
Swaziland	-	Manpower development and training facilities
Tanzania	-	Industrialization programs
Zambia	-	Development fund proposals, and mining
Zimbabwe	-	Food security plan, and security printing facilities.

A second aspect of SADCC involves the creation of functionally oriented commissions that assume responsibility for a task constituting too large a burden for any single government. The only commission to have been established so far is SATCC established in July 1980 and later given an institutional and legal identity under a convention ratified by all the SADCC members. Like SATCC which is based in Maputo, future commissions will be placed in the member state assigned responsibility for the task to be undertaken by the commission. In reality therefore, there will be no single SADCC headquarters for each member state will eventually be the seat of at least one sectoral commission. Endorsing the idea of sectoral commissions and other institutions fior SADCC, the official communique issued after the 1981 summit meeting in Harare observed that:

> "(These) institutions will provide SADCC with an effective and flexible mechanism for regional consultation and decision making. SADCC has eschewed the creation of a large and unwieldly bureaucracy in favour of a system which places responsibility for implementation of its programme on the governments of member states." [34]

The importance of SADCC therefore is that it seeks to foster a spirit of consultation and co-operation in tackling common problems experienced in the sub-region and hence avoiding the inevitable conflict that is brought about by the creation of regulatory trade regimes such as a customs union. The question here is whether the SADCC approach may be utilized to tackle the problem of commodity price fluctuations affecting commodities of interest to these countries.

First of all it must be pointed out that SADCC's approach involves the assigning of roles to each member country. It should be pointed out that as of the present time, no country has been assigned the role of co-ordinating commodity marketing policies let alone mineral marketing policies. This does not however mean that co-ordination of marketing policies is an area outside the scope of SADCC.

The objectives and the programme of action for SADCC were first stated in the Lusaka declaration and given legal content in the "memorandum of understanding". One of the main objectives of SADCC stated in the memorandum is to take

> "concerted action to secure international co-operation within the framework of a strategy for economic liberation." 35

---

34. See the communique issued by SADCC after its summit meeting in Harare in July 1981 (typescript).

35. Ibid.

The wording of this objective would seem to accommodate the carrying out of concerted action in co-ordinating marketing policies. If this be the case, one may be tempted to ask why this important aspect of economic liberation for the sub-region has so far not been assigned to any particular state in accordance with SADCC's sectoral policy. The reason would seem to lie not so much in the fact that these countries do not consider co-ordination of marketing policies as an important aspect but rather on the business like approach taken by SADCC in the creation of the sectoral commissions. Though the memorandum of understanding gives the Summit power to set up sectoral commissions whenever it sees fit, in practice the Summit has only taken this step when it was satisfied that there was a proven need for them. This attitude has been summed up well by President Masire of Botswana when explaining the role of sectoral commissions. He pointed out that:

> "such bodies (commissions) should be created only when there is a proven need for them. This deliberately business-like approach, in which institutions will follow achievement, surely promises greater dynamism than a system in which member governments merely react to proposals put forward by technocrats lodged in a centralized bureaucracy." 36

There is no doubt that all the countries of the sub-region experience the effects of price fluctuations on the world commodity markets particularly those involving minerals. A co-ordination of their marketing policies taken within

---

36. President Masire of Botswana, "Opening statement by the Chairman", SADCC summit meeting, Harare, July 20, 1981, typescript page 6.

the sectoral policy of SADCC may go a long way towards creating an environment through which the co-ordination of these countries marketing policies could be undertaken. The legal framework for the co-ordination of such policies already exists in the memorandum of understanding. What is lacking therefore is a decision by the summit proclaiming co-ordination of marketing policies as one of SADCC's priorities. Once this proclamation is made, Article 5 of the memorandum of understanding could be employed in setting up a sectoral commission with the responsibility of overseeing the co-ordination of mineral marketing policies.

There is every reason to believe that co-ordination of mineral marketing policies in the sub-region may help the countries involved exert a unified influence on international mineral marketing institutions. This unified approach may prove to be more successful than the current approach in which individual countries employ different arrangements for the marketing of their minerals. This approach provides one advantage which CIPEC does not enjoy. The joint marketing arrangement for Southern Africa, would encompass not only one mineral but a selection of major export minerals of all the countries in the sub-region. By encompassing a multiplicity of minerals, the countries in the sub-region may be able to strengthen their bargaining power on world copper markets by using other minerals such as chrome as a bargaining tool for better copper prices. In other words, since Zimbabwe for example, is a major chrome producer in the world, this product can be used in a co-ordinated marketing arrangement to boost prices of other minerals. This can be done by a carefully c culated withholding of the mineral whenever other minerals are facing low prices. Such a withholding may act to push up the prices of other minerals such as copper. In this respect therefore, this strategy may prove at least marginally, more successful than the strategy employed by CIPEC.

IV. Joint venture approach to mineral marketing co-ordination

An alternative approach through which Southern African countries may achieve a commercially viable co-ordination of their marketing poliices is through the creation of a mineral marketing joint venture. A regional public joint venture in this sense, should be understood as a corporate entity which is commercial in nature, created by treaty and controlled by all the treaty making states.

There are abundant examples of such types of corporations operating in many parts of the world. One such example is Air Afrique formed in 1961 as a by-product of the Yaounde treaty some of whose aspects have been discussed in Chapter 8 of this thesis. The agreement creating Air Afrique was signed by the governments of eleven West African nations. The main aim of this agreement was the establishment of a single multinational airline .

with ownership equally divided among the participating nations.[37] In addition, the agreement provides for a unitary structure for the corporation and provides for a registered office in each of the participating countries and provides full legal personality and powers within each of the member states as is normally granted to such corporations in each respective country.[38] Other examples are provided by Latin American Corporations set up between Paraguay and Brazil, and Paraguay and Argentina to exploit common hydroelectric resources; and Suaves Centrales which is a corporation created by Venezuela, Colombia and Central American states to undertake jointly the marketing of Central American coffee.

(i) <u>Legal status of joint international corporations</u>

Although there seems to be no broadly accepted definition of a joint venture in international law,[39] such joint international corporations have from time to time been created pursuant to a treaty. This has been a result of the international economic order that emerged after the wars, which envisaged the creation of international bodies corporate, the objective of which were to

> "... promote active business, extending some several countries to co-ordinate and direct national economic enterprises in a particular sphere of production, commerce and industry."[40]

---

38. Ibid., Article 4.

39. See UN, "Information note on joint ventures." Document A/Conf. 62/C.1/L.19, 18 May 1977.

40. C.M. Schmithoff, "The international corporation", (1944) 30 Grotius Society, 160 at p.180.

The precise legal nature of these entities however was not evidently clear. Some scholars saw these corporations as

> "... not constituted by the exclusive application of one national law, whose members and directors represent several national sovereignties; whose legal personality is not based or at any rate not entirely, on the decisions of a national authority or the application of a national law; whose operations finally are governed, at least pratically, by rules that do not stem from a single or even several national laws."41

Another group of scholars represented by Mann, were of the view that, the mere creation of a body corporate by treaty does not automatically confer on it international status. Analysing the example of SAARLOR, the French-German company for the exploitation of coal from the Saar and Lorraine regions of the two countries, Mann concludes that such a company in fact represented

> "two companies with different seats and nationalities, but with identical Articles ties to each other by provisions of the treaty requiring complete equalization between them..."42

This he concluded was a contractual formulation no different from that establishing UNILEVER by the United Kingdom and The Netherlands.[43]

---

41. B. Goldman "Less Societes internationales", cited in Phillipe Khan, "International Companies. A study of companies having internatinal legal status", Journal of Business and Trade law, volume 3, page 500.

42. F.A. Mann, "International Corporations and national law", (1967) British Yearbook of International law, page 145.

43. Ibid., page 146.

A view which supports Mann's analysis is represented by a situation in which the national law of the state in which such a corporation is incorporated works in such a way as to have the effect of amending the provisions of the treaty in the event of them being inconsistent with the national laws.

An alternative approach is to consider the international status of joint international corporations as arising from the very instrument creating them. In this respect, the treaty creating such a corporation may assert its own international legal status by limiting for example, the power of the state of incorporation to amend the provisions of the treaty. A good example of this is Article I of the convention creating the bank for international settlement which limits the power of the Swiss Assembly

> "to abrogate this ... to amend or add to it and ... to sanction amendments to the statute of the Bank ... otherwise than in agreement with the other signatory governments."

In recent years, a new dimension has been added to the nature of these corporations. Both within the EEC and the Andean sub-region, international joint corporations may now be created by way of a convention entered into by participating states and such corporations are required to operate under statute or by-laws under special regimes but are equally subjected to national laws of the member countries. Subjecting these corporations to the laws of the nation requires that such laws must be harmonized. This explains the harmonization of company laws taking place within the EEC.

The call made in this thesis for the creation of a Southern African regional marketing corporation may therefore proceed like in the EEC through the harmonization of the company laws in the sub-region or may proceed through an ad hoc creation of a corporation functioning under a special regime. The latter approach is endorsed by this thesis.

(ii) Harmonization of company laws in Southern Africa

Company laws in the Southern African sub-region disclose an untidy system occasioned mainly by the colonial experience of these countries. Countries in the sub-region that experienced British colonial rule such as Tanzania, Zambia, Malawi and Zimbabwe have company laws based on the common law system. Former Portuguese colonies of Mozambique and Angola and the former Belgian colony of Zaire employ civil law principles in their company laws. The system in Swaziland, Botswana, and Lesotho reveals a hybrid between the common law and civil law principles.

The problems arising out of this disparity in the company laws of the sub-region are well recognized but as yet have not been tackled.[44] What is clear though is

---

44. See 1960 London Conference calling for the elimination of differences in commercial laws towards uniform continental laws. A.N. Allott (ed.), The Future of Law in Africa: Record of proceedings of London Conference, 1959-60, London, (1960) page 41.

that a harmonization exercise must first of all confront the problem of bringing together civil law and common law corporate norms. Although this is a difficult task, harmonization of the sub-region's company laws is certainly a feasible proposition.

The feasibility of this proposition, stems from the fact that many of regional corporations likely to emerge in the sub-region are almost certainly to be in the nature of joint ventures, an arrangement in which parties are more partners than shareholders. Such arrangements are more likely to be described as quasi-partnerships, a concept which has similar meanings in both the civil and common law.[45] This similarity may take the process of harmonization of company laws to facilitate the creation of regional corporations in the area possible.

Furthermore, the harmonization process might be helped by recent developments in certain aspects of international law and regional law which have facilitated the breakdown of many barriers between civil and common law as is evidenced by work carried out by the EEC. If France and the United Kingdom, the architectures of the two systems can agree to harmonize their systems within the framework of the EEC, there seems to be no reason why countries in the Southern African sub-region who are recent recipients of the two systems may not do the same.

---

45. Re Westbourne Galleries Ltd. (1972) 2 W.L.R. 1289.

Company law harmonization in the sub-region however, will very much depend on the political will of member countries and their preparedness to relinquish strict adherence to notions of sovereignty. The history of earlier regional economic groupings in the sub-region shows that this political will has so far been lacking. The recent creation of SADCC and the work it has undertaken in the past few years however, indicates a preparedness by the countries of the sub-region to stick to and achieve the goals they have set for themselves. With this kind of political will, harmonization of these countries laws would seem to be a likely possibility albeit not in the very near future.

V. Creation of a Southern African Mineral Marketing Corporation under a special regime

Since for harmonization of the company laws of the sub-region to facilitate the creation of a joint mineral marketing corporation may involve a tortuous path which may require years of evolving appropriate corporate norms and rules, the establishment of the corporation under a special legal regime may be a more practical proposition.

The idea of creating international corporations under special legal regimes is not a new one and many examples are evident in many parts of the developing countries. Such examples include the CMAO multinational cement project between Ghana, Togo and the Ivory Coast; a joint Iron Ore corporation between Algeria and Tunisia;

a joint copper undertaking between Egypt and Zambia;[46] and Suave Centrales between Venezuela, Colombia, and Central American states for the marketing of Central American coffee.

A Southern African mineral marketing corporation, if created, should seek to harmonize mineral marketing policies of the member countries vis-a-vis the consumer, and undertake the marketing of all or selected minerals of significant importance to the sub-region such as copper and diamonds, so that sales contracts for example would be negotiated jointly through the corporation on behalf of the producers. In this way it would be possible for countries of the sub-region to exert a unified and concerted bargaining position when confronting the consumers. This process may greatly improve these countries' bargaining position in the international mineral markets.

A treaty establishing such a corporation may be negotiated within the framework of SADCC and should provide for the incorporation of the enterprise in one of the member states as determined by factors such as mineral location, infrastructure, communication facilities and banking facilities. The mechanism for achieving this is already available in SADCC in the form of the sectoral commissions arrangements. Like in the case of SATCC, a sectoral commission responsible for mineral marketing

---

46. See Economic Commission for Africa: Report of the third conference of African Ministers of Industry, (Kenya) 1975, page 11.

would have to be created and an appropriate convention entered into formally creating the marketing corporation and providing for its powers, functions, objectives, immunities, operational and financial provisions. The legal capacity of such a corporation would result from this instrument.

One of the important provisions of such a treaty must provide for the incorporation of the corporation in one of the member countries, preferably in the country housing the seat of the marketing sectoral commission. Provision must then be made for the corporation to be registered in all the participating states where registered offices should be created to handle local affairs of the enterprise. Such registration will amount to the legal recognition of the corporation by the laws of participating states.[47]

The inclusion of the above provisions in a treaty creating such a corporation would result in the legal jurisdiction of the corporation lying in the state of incorporation. It is this state that may apply the laws establishing the corporation, those under which it operates (both by-laws and statutes), and laws of the participating states to the extent that these are not inconsistent with its own laws.

A principle of equal participation reflecting the participating states' shareholding, must guide in matters

47. See for example, articles 18, 19 and 23 of the Andean Commission's Decision 46, (1972) 11, International Legal materials page 359.

such as appointment of directors to the board, management, members of various committees, employment, training, and foremost the distribution of benefits.

Mechanisms should be written into the treaty reflecting the multinational nature of the corporation in order to avoid a situation in which one or a few states seek to dominate the activities of the corporation.

Finally, care should be taken to provide an adequate dispute settlement procedure which would be used in an event of a dispute. A dispute settlement procedure that provides for arbitration through a regional arbitration body would seem to be a more suitable approach because it is likely to facilitate reconciliation between the members in dispute rather than arbitration conducted by a body outside the framework of the regional arrangement.

CHAPTER TEN

SUMMARY AND CONCLUSIONS

This chapter summarizes the implications of the research discussed in previous chapters. Besides providing a summary of conclusions arrived at in those chapters, it attempts to place the conclusions in a broader perspective and suggesting practical steps governments in mineral producing developing countries may take in furthering their common interest in the stabilization of copper prices.

The research has revealed a number of important issues regarding rules and institutions connected with the marketing of Zambian copper.

The first issue relates to the role of the London Metal Exchange in the setting of prices for copper produced in Zambia. As it emerged from the discussion in chapter three, although Zambia does not market its copper through the LME, the international arrangement for the marketing of minerals are such that the prices it receives elsewhere follow closely the daily prices established on this institution. Despite the implications arising from this set up, the LME is from a legal point of view a privately owned British company which like any other such body corporate is accountable mainly to its members and its ultimate power lies in the Board of Directors selected by the shareholders. This being the case, the rules of the

LME impose no obligation on the Board of Directors to inform the outside world about the activities of its members in relation to how they arrive at the price for a commodity like copper. This means that the Exchange is not amenable to some kind of international machinery that would impose some kind of accountability against unintentional over-commitment or even fraud in the setting of prices for commodities such as copper.

To add to this problem, the rules of the LME regarding membership, as has been demonstrated in chapter three, are heavily biased against producer developing countries. Thus for example, ring members are composed entirely of the metal producing multinationals based in the developed countries, metal and commodity trading corporations, banks and other financial conglomerates, as well as general international trading and investment groups of the developed countries. In its organization, structure, ownership, and place in the market therefore, this Exchange is far from a sound and unbiased creator of copper prices as it would normally like to claim.

A body with such a powerful role to play but excludes the participation of the major producing and exporting countries, must at the very least be subjected to full international accountability. It is therefore a dangerous solution to suggest as some writers have done, that a new scenario should be worked out enabling copper marketing corporations set up by copper producing developing countries to join the main actors on the LME and work in collusion with them. The dangers of this approach are linked to the nature of the main actors on the Exchange. Almost all of them are vast multinationals with interests not only in copper but other minerals and with vast financial resources which they could use to outwit copper marketing corporations of the developing countries. The creation of a reasonably open and competitive system, working under clear and internationally agreed rules appears to be the only approach that would assure a country like Zambia a fair price for its copper and assure it of its full sovereignty over its natural resources.

Until such an approach is worked out and agreed upon, Zambia and indeed other copper producing countries would continue to depend on intergovernmental measures aimed at the stabilization of copper prices and the amelioration of the effects of price fluctuations on their export earnings. These intergovernmental measures however, have serious limitations which need to be overcome before these measures can produce favourable results for producers of copper.

The second major issue that has emerged in the thesis relates to intergovernmental measures aimed at the stabilization of copper prices. One of these measures involves the creation of the international commodity agreement for copper.

An international commodity agreement is basically a treaty involving both the governments of exporting countries and consuming nations and involves as has been discussed in chapter four, the utilization of various mechanisms aimed at the stabilization of the price of a commodity in question. For such an agreement to succeed in this objective however, a number of factors must be present. The first and perhaps the most important factor is that there has to be agreement between the two groups of governments as to the desirability of such an arrangement. Secondly, the stabilization mechanism must be effective, and finally that there should be adequate financial resources for supporting whatever mechanism is employed.

The need for the conclusion of a copper commodity agreement has for a long time been acknowledged. This fact is made obvious by the UN integrated programme for commodities which lists copper as one of the major candidates for which the commodity agreement approach may prove useful in the stabilization of its prices. Negotiations for the conclusion of such an agreement have been conducted on several occasions since 1976 but to date no such agreement has materialized. The lack of agreement may be attributed to the inherent weakness of this approach. The approach depends for its success on the compromise of the interests of the consumer nations and those of producers. In the case of copper producers and consumers this compromise has not been possible. The main point of disagreement between the two countries relates to the nature of the stabilization machinery to be employed by such an agreement, that is to say whether it should involve only a buffer stock or a buffer stock coupled with production management. A second point of disagreement involves the price range such a machinery should support.

Although therefore, the commodity agreement approach has potential in stabilizing prices of copper, its usefulness will be determined by the ability of copper producing countries and consuming nations to reach agreement regarding main economic provisions such as the range of prices to be supported. For an agreement to be reached, these provisions must reflect a fair balance between the interests of both consumers and producers and must be flexible and evolutionary providing for adjustment to changing circumstances.

Even if this basic agreement is achieved, one problem remains to be tackled and that is, the financing of the activities of the resulting international copper organization. This problem has over the years contributed to the disappointing performance of the commodity agreement approach. It was in an attempt to tackle this problem that the Common Fund was created. In Chapter V various problems relating to the fund are discussed but perhaps the most important issue relates to its ability to fund a copper agreement.

A number of problems in the organization of the Common Fund may result in its inability to adequately finance a copper agreement. Among these problems are those relating to the contributions to be made to the fund, the use of such resources by associated commodity organizations, and the decision making machinery to be employed by the fund.

As discussed in chapter five the fund resources in the first account which is particularly relevant to the issue of price stabilization, are to be constituted by contributions made by member countries, deposits made by the international commodity agreements to be affiliated to it, and borrowings made by the Common Fund from the international money markets. The adequacy of the fund resources therefore, will depend on at least three things. First, the ability of member countries to meet their obligations to the Fund in terms of contributions. Secondly, to the number of international commodity agreements that would be constituted and affiliated to the fund, and finally to the ability of the Fund itself to mobilize resources from the money markets. The first issue does not seem to raise a lot of problems since the contributions by member countries are determined through a weighted formula which enables countries to contribute according to their ability. Such contributions however are not adequate to support buffer stocks in a number of commodities as is proposed under the Fund arrangements. The two other issues however raise a number of problems. For example, the contributions to be made by commodity organizations will depend on the ability of consumer and producer countries in various commodities concluding commodity agreements. The problems in this aspect have been discussed in chapter four. Without the conclusion of such agreements, this source of the Fund's resources would not be available. The third problem relates to the borrowings to be made by the Fund from international markets. In this aspect the problem would seem to lie in the fact that such borrowings would have to be made from financial institutions in the developed countries since developing countries do not command adequate financial resources. This being the case problems may arise regarding the willingness of such financial institutions to lend monies that would be used in stabilizing commodity prices since the countries in which they are situated may be interested in obtaining such commodities at the cheapest possible prices.

Apart from the problems of the constitution of resources for the fund and the conclusion of commodity agreements there is the problem of the decision making machinery in the fund. The distribution of votes in the Fund is based on member contributions. This approach has been employed in other international organizations and has been a subject of criticism particularly by developing countries since it tends to give more power to the developed countries in decision making at the expense of the financially weaker developing countries. The use of this approach in the Fund will innevitably mean a firm control by developed countries of the decision making machinery. It is ironical that an institution like the Common Fund which seeks to deal with problems of commodity price fluctuations, which is mainly a problem facing the developing countries, should be controlled by the developed countries who do not face this problem.

Given these constraints, it is clear that the commodity agreement approach even supported by a Common Fund may not be an adequate solution to problems of copper price fluctuations. As stated in chapter 3, any serious structural reforms of the norms governing the marketing of a mineral like copper are bound to undermine the economic well-being of the developed countries which depend on uninterrupted access to industrial raw materials. In this respect the weighted system of voting in the Common Fund will only accentuate the power struggle between producers and consumers of copper. Utilizing the weighted system of voting makes it unlikely that the member states commanding the largest bloc of votes would vote in favour of policies which they consider to be detrimental to their national economic interests.

The third major issue revealed by the study relates to producer association approach employed by CIPEC. CIPEC is an intergovernmental association of producers which seeks to exert a conscious change in international copper marketing arrangements. One of its main aims is to co-ordinate measures designed to ensure the growth of members' real income from copper exports, harmonize member country policies relating to production and marketing of copper, and the exchange of information between members relating to production and marketing.

However, CIPEC has been unsuccessful in the area of price stabilization. Its failure in this respect, appears to be tied to the nature of the constitutional instrument it employs. Its agreement lacks economic provisions which could enable it to control members' copper production levels, or enable members to undertake a joint stocking arrangement that would enable it control the movement of prices on world markets. This lack of economic provisions has resulted into a situation in which such measures are attempted as need arises through consultation but leaving the ultimate decision as to employment of such measures to individual member countries. This somewhat informal approach has raised problems which has made the approach wholly ineffective in stabilizing copper prices. For example, in the two instances when CIPEC members agreed to cut production in 1974 and 1975, some members did not effect the cutbacks. Even those countries that made the cutbacks did not quite agree on the levels for an effective cutbacks because they could nto agree on the base levels of production and sales upon which an effective cutback could be calculated. As a result the two cutbacks had only the minimum of effect on the prices of copper.

Although the informal approach taken by CIPEC has proved a failure in stabilizing copper prices, it has proved useful in fostering a sense of solidarity between member countries whenever one of its members took individual measures to seek to influence prices. It has also acted as a useful instrument for the exchange of information between members aimed at a better understanding of the world copper markets.

To remedy copper price fluctuations, CIPEC member countries will need to re-examine its agreement so as to include economic and financial provisions that would enable it to adopt a price support scheme in the nature of a buffer stock coupled by production control. The major hurdle in this respect would be how to meet the cost of financing such a buffer stock. Unlike international commodity agreements composed of both producers and consumes, CIPEC countries do not have access to either the IMF buffer stock financing facility or the Common Fund facility. It is unlikely that CIPEC countries may be able to obtained finances for this purpose from otehr international financial institutions, because many of these institutions are largely controlled ;by copper consuming nations which would prefer to see an international commodity agreement for copper rather than an association of producer countries. Indeed this appears to be the attitude taken by the IBRD to a request made by the Zambian Minister of Finance, John Mwanakatwe in November 1971. The Minister appealed to the IBRD for financial assistance to build a stockpile for copper out of surplus supplies in order to remedy the then prevailing abnormally low prices. The bank has never responded to that request. This financing problem will have to be tackled by CIPEC itself. One of the options open to CIPEC in tackling this problem may be to work out a decentralized form of a buffer stock mechanism in which each member country would undertake the stocking of copper produced in excess of the agreed limits. This decentralized approach to buffer stocking may alleviate or reduce the difficulties involved in the setting up of a joint buffer stock with all its attendant administrative and other costs. Even this approach however, will require the commitment of substantial financial resources by member countries.

Given the constraints inherent in the CIPEC agreement itself, as well as the financial problems involved in its ability to utilize the buffer stocking mechanism, it would seem that this organization is unlikely to succeed in stabilizing the world prices for copper. This would seem to be the case not withstanding the fact that it has encouraged a sense of solidarity between copper producers.

Prospects for more success by CIPEC would certainly improve if it could work in conjunction with other producers' associations such as those of Bauxite or aluminium. There is evidence that contacts towards this approach have already begun. Representatives of the Bauxite Producers' Association have since 1974 been regular attendants at the CIPEC Ministers' conferences.

The limited success of the commodity agreement approach and the producers' association approach brings into focus the fourth major scheme examined in the thesis. This issue involves international financial support schemes. Two such schemes have been discussed in chapters seven and eight. These are the IMF compensatory financing scheme and the scheme of financial transfers contained in the Lomé convention aimed at the stabilization of the export earnings of associated member countries such as Zambia.

The Lomé Convention is thought by many to be a model agreement on cooperation between two sets of countries. Looking at it in a wider perspective however, reveals an agreement aimed at maintaining economic complementarities between a group of developing countries and a group of developed countries. The provisions of the convention dealing with the issues of primary commodity marketing, that is, provisions dealing with the stabilization of export earnings appear to be based on this wider interpretation of the convention.

These provisions, which in the case of agricultural commodities are code named STABEX and in the case of mineral products are code named SYSMIN, enable ACP countries to hedge against fluctuations in world market prices resulting into deterioration in their export earnings or production cutbacks having the same effect. These provisions obviously do provide some advantages to a country like Zambia which depends almost entirely on one export commodity, copper. But it may be more important to the EEC countries who may through these provisions ensure a stronghold on the sources of copper from Zambia and assure that Zambia remains a viable EEC market for their manufactured goods.

The limiting nature of the benefits of Lomé to Zambia is indicated in the operation of SYSMIN. The compensatory payments under SYSMIN have been very restricted in size and have almost entirely gone to the rehabilitation of the copper mines rather than rehabilitating the entire economy. The SYSMIN scheme provides financial assistance to a copper producing country like Zambia in two forms. First the scheme can provide guarantees for private loans to help maintain a certain level of production. Secondly, the scheme may provide direct aid to the Zambian government if the production problems were combined with lower world copper prices.

Although the scheme may sound interesting, the amounts available under the scheme are extremely low and in many cases would not make any noticeable impact on the economy of a country like Zambia that experiences continued price fluctuations in the prices of copper. The amount made available for the duration of the entire Lome II under this scheme was only 280m. European Units of Account (about 378 million USA dollars). This amount is clearly inadequate to support production in Zambia alone for one year, and yet it is earmarked to support production for seven minerals produced in thirteen ACP countries for a period of five years.

This inadequacy in the funds is made clear by the case of Zambia. In May 1982 for example, the ACP-EEC Council of Ministers approved 55 million European Units of Account for Zambia. This amount was made available to the Zambia Consolidated Copper Mines for copper-cobalt industry rehabilitation. The total sum required for the rehabilitation however was over 85 million European Units of Account.

For an ACP country like Zambia, the problem of insufficient funds under the SYMIN arrangement is made worse by two other issues. First, since the scheme becomes operational when production of copper decreases, it is not possible to obtain compensation in a situation in which actual production increases but earnings decrease. In this respect it would appear as though the scheme is not entirely satisfactory in alleviating the problem of fluctuations in either the prices of copper or export earnings from the mineral. The second issue concerns the institutional machinery provided under the second Lome convention. The convention sets up three principal organs namely the Council of Ministers, the Committee of Ambassadors, and the Consultative Assembly. All these organs provide a machinery for consultation between ACP and EEC countries regarding the general policies and the implementation of such policies. The actual decisions regarding transfer of resources under the SYSMIN arrangement however, are largely in the hands of the EEC Commission. In this respect, Article 53 states that:

> "... The application for aid shall be made to the Commission which shall examine it in conjunction with the ACP state concerned. The fact that the conditions have been fulfilled shall be established by common accord between the Community and the ACP state. Notification thereof by the Commission to the ACP state shall entitle the latter to Community aid from the special financing facility."

This power to make the final decision on whether aid would be granted or not seems to lie finally on the EEC Commission. Furthermore, the decision on the amount of aid to be granted to a country that has applied lies in the Commission as well. Article 54 states that:

> "... The amount of this aid to finance projects or programmes should be determined by the Commission in the light of the funds available under the special financing facility, the nature of the project or programme proposed by the ACP states concerned and the possibilities of co-financing...."

These two provisions make it clear that the joint institutions of the ACP-EEC states provide only an advisory machinery and play only a minor role in the decisions regarding the actual disbursement of aid in the SYSMIN scheme.

The subordination of the joint institutions means in effect that ACP countries cannot effectively determine the pattern of aid under the scheme either as a group or as individuals. Increasing the power of the joint institutions in future conventions may greatly increase the effectiveness of the SYSMIN scheme as well as the overall credibility of the ACP-EEC co-operation. It should be observed that coupled with theproblems facing negotiations towards the conclusion of a copper agreement is the problem of the very existence of the Common Fund. For the Fund to be activated, at least 90 of the countries that signed the agreement creating it must ratify it. The 90 ratifications must represent at least two-thirds of total financial contributions to be made to the Fund by members. However, by the end of December 1983 only 64 ratifications had been made representing only 41 per cent of directly contributed capital. Although all the full members of CIPEC have ratified the agreement, many European countries and the United States have not done so making it difficult for the Fund to come into effect.

The third ACP-EEC convention of Lomé was signed on December 8, 1984. In as far as the SYSMIN scheme is concerned, no changes have been incorporated in the new agreement. The admissibility rules, that is the dependence thresholds for bringing the system to operation remain unchanged. The list of products to be covered by the scheme remains unchanged although it is now possible for other minerals not included in the list to benefit from the scheme on a case by case derogation.

SYSMIN aid is still in the form of contributions to clearly defined projects. Whereas in the second Lome convention the emphasis in such projects was required to be on maintaining production capacities, under the third Lomé convention, such projects are required to be geared towards the restoration of the mining industry's viability. Such projects must therefore aim at the rehabilitation, maintenance, and rationalization of the industry. Despite the different wording used in the new convention, the effect of the scheme on those countries utilizing it is bound to remain very much the same as it was in the second Lomé convention.

The second compensatory financing scheme through which Zambia may seek assistance in the event of its export earning declining as a result of price fluctuations is the IMF compensatory financing scheme. This scheme is clearly a reflection of the main purpose of the IMF which in general terms is to provide short-term balance of payments stabilization to member countries. It is generally accepted that fluctuations in export receipts do tend to affect balance of payments and therefore consistent with the aim of the organization.

The operation of the scheme reveals a number of constraints that make it not an adequate solution to Zambia's copper earnings fluctuations. The first major constraint is that the scheme is not commodity oriented but based on issues of balance of payments. This means that for a country like Zambia to benefit from the scheme, copper price fluctuations must translate themselves to a balance of payments problem. The crucial issue of price fluctuations is therefore not a matter of prime concern to the IMF scheme.

The second constraint relates to the fact that the scheme functions by way of loans to the affected countries. Such loans are eventually to be repaid by the countries involved. Thus although the scheme does provide some relief in alleviating the consequences of copper price fluctuations on Zambia's balance of payments, the relief is of a temporary nature. In fact such temporary relief may induce such a country to depend on the scheme to the extent that its debt problems are made worse. Restructuring the scheme so as to transfer financial resources without necessarily requiring the repayment of such finances may go a long way in improving the benefits that can accrue to a country like Zambia.

The constraints in the use of the above intergovernmental regulatory techniques brings into the fore another technique which can be considered and which has potential for success. This technique avoids the market sharing problems involved in the commodity agreement approach, and may be used in conjunction with the producers' association approach and compensatory financing schemes. This technique would be the establishment of an intergovernmental joint marketing agency on a regional basis which would act as sole buyer for particular commodities produced by countries in the region, and as sole seller of such commodities to developed importing countries. Such an agency could maintain its own stocks which could, in effect, be used in much the same way as the traditional type of international buffer stock arrangements to smooth out price fluctuations. But in addition such a joint agency could be in a position to exert a regional bargaining position on international marketing institutions.

In chapter nine such an approach is suggested in relation to minerals in Southern Africa. SADCC does seem to be an appropriate unit through which such a joint marketing arrangement may take place. There are two main reasons for this. First, that SADCC provides the necessary political atmosphere that is necessary for the success of any regional joint venture. Secondly, SADCC provides a unit encompassing nine countries some of whom are heavily dependent on the exports of minerals. Angola produces quantities of oil, Zimbabwe produces at least six minerals, Zambia depends heavily on the export of copper. Tanzania, Lesotho and Swaziland produce small quantities of various minerals while Botswana is a substantial producer of diamonds. Although almost all SADCC countries produce at least a small quantity of one or more minerals, SADCC would do well to admit Zaire into the group since Zaire is a big producer of various minerals and may add a lot of muscle to any joint mineral marketing arrangement. Zaire itself has been keen to join the organization and has presented its application at all summit conferences since 1982. It would be to the advantage of all those countries dependent on mineral exports in the sub-region to facilitate the inclusion of Zaire in the organization. Zambia in particular, would do well to lobby the other SADCC members so as to facilitate the admission of Zaire.

The inclusion of Zaire into SADCC does not appear to be inconsistent with its geographical position or its traditional economic ties. In fact geographically, Zaire may claim to be in very much the same position as Tanzania and therefore there is no reason why Tanzania is included in SADCC and Zaire excluded. As far as traditional economic ties are concerned, Zaire can claim to have been more closely affiliated to most countries in Southern Africa than Tanzania.

The operational principle suggested for such an agency is one of a joint venture corporate body involving all the members of SADCC. The mode for the creation and operation of such a joint venture would involve elaborate and carefully worked out principles which will in the ultimate involve the harmonization of those laws in the sub-region dealing with mineral marketing arrangements as well as the corporate laws.

With the creation of such a joint marketing corporation for minerals, there is bound to be an increased scope for the use of long term marketing agreements between the corporation and consumers in developing countries. Such long term agreements could specify annual quantities to be traded and to the extent that prices can be specified, the agreements could go a long way in reducing instability in the prices of minerals such as copper. Long term agreements of this nature are common on a bilateral basis between foreign trade enterprises of socialist countries of Eastern Europe and national trading corporations of individual developing countries.

Such long term agreements entered into by a regional marketing corporation such as is suggested for Southern Africa would go a long way in assuring mineral exporting countries in the region, such as Zambia, a profitable return from their mineral exports than they have had to date.

International mechanisms for the stabilization of prices of minerals and other commodities have not been entirely successful and need radical changes. The instruments of the future will depend on the willingness and imagination of commodity producers to formulate poliices jointly with other commodity producers.

SELECTED BIBLIOGRAPHY

Books

Abdulqawi, Yusuf, Legal aspects of trade preferences for developing states. Martinus Nijhoff publishers, The Hague, 1982.

Amacher, R.C., Haberler, G., and Willet, T.D. (ed.) Challenges to a liberal international eocnomic order. American enterprise institute for public policy research, Washington D.C., 1979.

Angelopoulos, Angelo Th., For a new policy of international development. Praeger publishers, New York, 1977.

Atimomo, Emiko, Law and diplomacy in commodity economics. The MacMillan press Ltd., 1981.

Baldwin, R.E., Richardson, J.D. (edition), International trade and finance readings. Little, Brown and Co., Boston, 1974.

Banks, F.E., The world copper market. Cambridge, Massachussets, 1974.

Baxter, T.W., Occasional papers of the national archives of Rhodesia and Nyasaland, No. 1. Salisbury, 1963.

Behrman, Jere, R., International commodity agreements: An evaluation of the UNCTAD integrated commodity programme. Overseas development council, NIEO series, monograph no. 9, October 1977.

Bohm, P., Pricing of copper in international trade: A case study of the price stabilization problem. Stockholm, 1968.

Boor, G., Judicial control of the European communities. London, 1962.

Bostock, R.M. and Harvey, C., Economic development and Zambian copper: A case study in foreign investment. East African publishing house, 1972.

Brandt, W., Common crisis. North-South: Co-operation for world recovery. Pan books, London, 1983.

Brown, M., and Butler, J., The production, marketing and consumption of copper and aluminium, 1968.

Callaghy, T.M. (ed.), South Africa in Southern Africa: The intensifying vortex of violence. Praeger publishers, New York, 1983.

Clarfield, K.W., Jackson, S., Keefee, J., Noble, M.A., and Ryan, A.P. (ed.), Eight mineral cartels: The new challenge to industrialized nations. 1975.

Corbet, Hugh, Raw materials: Beyond the rhetoric of commodity power. Trade and research centre, international issues no. 1.

Cordovez, Diego, UNCTAD and development strategy: from confrontation to strategy. Published by the journal of world trade law.

Cuddy, J.D.A., International price indexation. D.C. Heath Ltd., 1976. London.

Dorner, P. and Mahmoud, A. El-Shafie (ed.), Resources and development: Natural resource policies and economic development in an interdependent world. University of Wisconsin Press, 1980.

Stover, W.A., Renegotiations in international business transactions, Lexington books, 1981.

Edwards, A., The potential for new commodity cartels. Economic intelligence unit, London, 1975.

Elian George, The principle of sovereignty over natural resources. Sijthoff and Noordhaff, 1979.

Elliot C. (ed.), Constraints on the economic development of Zambia. Oxford University press, Nairobi, 1971.

Faber, M.L.O., and Potter, J.G., Towards economic independence: Papers on the nationalization of the copper industry in Zambia. Cambridge university press, 1971.

Fawcett, James, International economic conflicts, Europa publications Ltd., London, 1977.

Fawcett, J.E., and Parry, A., Law and international resource conflicts. Clarendon press, Oxford, 1981.

Fox, W., Tin: The working of a commodity agreement, Mining Journal Books, London, 1974.

Friedman, Wolfgang, The changing structure of international law. London, 1964.

Ghai Dharma, Taxation for development. East African publishing house, Nairobi, 1970.

Girvan, N., Copper in Chile: A study in conflict between the corporate and national economy. Kingston, Jamaica, 1972.

Gold, Gerald, Modern commodity futures trading. 7th edition, Commodity research incorporation, New York, 1975.

Greig, D.W., International law. Butterworths, 1976.

Grewlich, K.W., Transnational enterprises in a new international system. Sijhoff and Noordhoff, Netherlands, 1980.

Haberler, Gottfried, The theory of international trade. New York, 1937.

Hallwood, P., Stabilization of international commodity markets. Jai press incorporation, Greenwich, Connecticut, 1979.

Hamid, G.M., The Lagos plan of action and the development of mineral resources in Africa. In CODESRIA (ed.), Africa development, volume VII, No. 1/2, 1982.

Hawkins, P., (ed.) Research in international business and finance, volume 1, Jai Press Inc., Greenwich, Connecticut, 1979.

Helleiner, G.K., (ed.), A world divided: The less developed countries in the international economy. Cambridge University press, 1978.

Helleiner, G.K., International economic disorder: essays in north-south relations. The MacMillan press Ltd., London, 1980.

Hossain, K. (ed.), Legal spects of the new international economic order. Frances Pinter, London, 1980.

Jankowitsch, Odette, and Sauvant, The world without superpowers: the collected documents of the non-aligned countries. volume 1, Oceana publications incorporation, New York, 1978.

Johnston, C.R., Law and policy of international commodity agreements. Volume 1, 1976.

Koopmans, T. (ed.), Constitutional protection of equality. A.W. Sijthoff-Leden, 1975.

Koul, A.K., The legal framework of UNCTAD in world trade. A.W. Sijthoff, Bombay, 1979.

Kouri, P.J.K., Trade in primary commodities and the new international economic order. UNITAS, Helsinki, 1977.

Kronstein, H., The law of international cartels. Cornell University Press, 1973.

Laszlo, Ervin, Baker Robert, Eisenberg, Elliot, and Raman, Venkata, The objectives of the new international economic order. Pergamon press, New York, published for UNITAR, 1979.

Laursen, Karsten, The integrated program for commodities. IBRD, Washington D.C., 1977.

Law, D.A., International Commodity Agreements. Lexington books, Lexington, Massachussets, 1975.

Lazar, Leonard, Transmittal and instructional sheet for transnational economic and monetary law transactions and contracts. 1977.

Lombard, C.S., Tweedie, A.H.C., Agriculture in Zambia, National Education Company of Zambia, 1974.

Long, Frank, The political economy of EEC relations with African, Carribean and Pacific states: contribution to the understanding of the Lomé convention on North-South relations. Pergamon press, 1980.

Lowenfeld, A.F., International private trade. Mathew Bender, New York, 1977.

MacAvoy, P.W., Economic perspective on the politics of international commodity agreements. The institute of government research, University of Arizona, 1977.

MacNichol, D.L., Commodity agreements and price stabilization: A policy analysis. Lexington books, Massachusetts, 1978.

Mahnoush, H.A., International regulation of internal resources: A study of law and policy. University press of Virginia, Charlottesville, 1981.

Meerhaeghe, M.A.G., Van, International economic institutions. 2nd edition, Longmans, London, 1971.

Metzger, S.D., Law of international trade: documents and readings. Volume 2. 1966.

5

Metzger , Dorothea, Copper in the world economy. Heinemann, London, 1980.

Mikesell, Raymond F., Foreign investment in the petroleum and mineral industries. The John Hopkins Press, baltimore, 1971.

Mikesell , Raymond F., The world copper industry. Published for resources for the future by the Johns Hopkins University press, Baltimore, 1979.

Mikdashi, Zuhayr, The international politics of natural resources. Cornell University Press, Ithaca, New York, 1976.

Mortner, Gonzola, Survey of producers' associations of developing countries. A United Nations action programme for economic co-operation report. Georgetown, 1976.

Morton, Kathryn and Tulloch, Peter, Trade and developing countries. Croom Helm, London, in association with the overseas development institute, 1977.

Mutharika, A.P., The international law of development: basic documents. Volumes 1 and 2, Oceana publications incorporation, Dobbs Ferry, New York, 1978.

Nsekela, A. (ed.), Southern Africa: Toward economic liberation. Rex Collings, London, 1981.

Oppenheimer, Peter (ed.), Issues in international economics. Oriel press Ltd., Stocksfield, England, 1980.

Otaiba, Al., OPEC and the petroleum industry. Croom Helm, London, 1975.

Payer, Cheryl, Commodity trade of the third world. MacMillan press, London, 1975.

Pearce, D.W., The economics of natural resource depletion. MacMillan press, New York, 1975.

Post, Merle Alexander, Deepsea mining and the law of the sea. Martinus Nijhoff, The Hague, 1983.

Prain, Ronald (Sir), Copper: The anatomy of an industry. Mining Journal books Ltd., London, 1975.

Prebisch, Raul, Towards a global strategy of development. United Nations publication No. E.68.11.D.6.

Radetzki, Marian, International commodity market arrangements. C. Hurst, London, 1970.

Radetzki, M., and Zorn, S., Financing mining projects in developing countries. Mining Journal Books Ltd., London, 1979.

Raugarajan, L.N., Commodity Conflict: The political economy of international commodity negotiations. Croom Helm, London, 1978.

Reidy, B., Edwards, J., and De Keyser, E., Guide to world commodity markets. Kogan page Ltd., London, 1974.

Reubens, E.P. (ed.), Challenge of NIEO. Westview Press Inc., USA, 1981.

Ridker, Ronald G., Changing resource problems of the fourth world. Resources for the future, Washington DC, February 1976.

Roberts, Andrew, A history of Zambia. Heinemann, 1976.

Rothstein, Robert L., Global bargaining: UNCTAD and the quest for a new international economic order. Princeton, New Jersey, 1979.

Schachter, Oscar, Sharing the world's resources. Columbia University Press, New York, 1977.

Schmithoff, C.M. (ed.), The harmonisation of European company law. The UK national committee of comparative law, London, 1973.

Schwarzenberger, G., The dynamics of international law. 1976.

Schwarzenberger, G., The frontier of international law. 1962.

Seidman, A., Natural resources and national welfare: the case of copper. New York, 1975.

Shaw, C. (ed.), Legal problems in international trade and investment, 1962.

Sideri, S. and Johns S. (ed.), Mining for development in the third world: multinational corporations, state enterprise and the international economy. New York, Pergamon with institute of social studies at the Hague, 1980.

Sklar, R.L., Corporate power in an African state: the political impact of multinational mining companies in Zambia. University of California Press, Berkeley, 1975.

Smith, David N., and Wells, Louis T., Negotiating third world mineral agreements. Ballinger, Cambridge, Massachusetts, 1975.

Sohn, Louis B., Basic documents of African regional organizations. volume IV, 1972.

Steiner, H.J. and Vagts, D.F., Transnational legal problems. The Foundation Press Inc., Mineola, New York, 1976.

Stoneman, Colin (ed.), Zimbabwe's heritage. The MacMillan Press Ltd., London, 1981.

Tostensen, A., Dependence and collective self-reliance in Southern Africa: The case of the Southern African Development Co-ordinating Conference (SADCC). Scandinavian institute of African studies research report no. 62, Uppsala, 1982.

Valentine, D.G., The court of justice of the European Communities. volume 1, London, 1965.

Van Themaat, Verloren, The changing structure of international economic law. Martinus Nijhoff publishers, The Hague, 1982.

Varon, Benslon (ed.), Obstacles to mineral development: A pragmatic view. Pergamon Press, New York, 1979.

Von Geusau, Frans A.M. Alting (ed.), The Lome Convention and a new international economic order. A.W. Sijthoff, Leyden, 1977.

Weisfelder, Richard F., The Southern African Development Co-ordination Conference: A new factor in the liberation process. In Callaghy Thomas M., South Africa in Southern Africa: The intensifying vortex of violence. Praeger publishers, New York, 1983.

Weston, A., Cable, Vincent, and Hewitt, Adrian, The EEC's generalised system of preferences. Overseas development institute, 1980.

Widstrand Carl (ed.), Multinational firms in Africa. Nordiska Afrikainstitutet, Uppsala, Sweden, 1975.

8

Williams, Harold, The Mining law of Northern Rhodesia. 1963.

ARTICLES

Akinsanya, A., "Host government's responses to foreign economic control: the experiences of selected African countries." The international and comparative law quarterly, volume 30, October 1981, 769.

Anglin, D.G., "Economic liberation and regional co-operation in Southern Africa: SADCC and PTA." International Organization, volume 37, number 4, Autumn 1982, 681.

Benedek, Wolfgang, "The Lome Convention and the international law of development: a concretisation of the NIEO." Journal of African law, Spring 1982, 74.

Cohen, Benjamin J., "Balance of payments financing: evolution of a regime." International Organization, volume 36, no. 2, Spring 1982.

Cosgrove, Carol Ann, "The EEC and its Yaounde associates: a model for development." International relations, volume IV, no. 2, November 1972, 142.

Cosgrove, Carol Ann, "The Second Yaounde convention in perspective." International Relations, volume III, no. 9, May 1970, 679.

Dale, William (Sir), "Is the Commonwealth an international organization?" 31 International comparative law quarterly, 451.

Dorsey, John F., "Preferential treatment: a new standard for international economic relations." 18 Havard international law journal, no. 1, Winter 1977, 109.

Francis, L.B., "Producers' Associations in relations to the new international economic order." The international and comparative law quarterly, volume 30, part 4, October 1981, 745.

Franck, T.M., "Standards of international commodity negotiations." 160 Academie De Droit international recueil des cours II, 1978, 403.

Friedman, "Antitrust law and joint international business ventures in economically underdeveloped countries." 60 Columbia law review, 1960, 780.

Gann, L.H., "The Northern Rhodesia copper industry and the world copper: 1923-52." The Rhodes-Livingstone Journal, volume 18, 1975, 5.

Gerhard, Fels, "The exports of the developing world." The Commonwealth Journal of international affairs, July 1973, 305.

Green, R.H., "Towards Southern African Regionalism: the emergence of a dialogue." Africa contemporary record, 1978-79, A44.

Gwyer, G.D., "Three international commodity agreements: the experience of East Africa." Economic development and cultural change, 21st October 1972, 465.

Hexner, "Interpretation by public international organisations of their basic documents." 73 American Journal of International Law, 1979, 341.

Hutton, N., "Sources of strain in the Euroafrican association." International relations, volume IV, no. 3, May 1973, 288.

Jaeger, W.H.E., "Joint ventures: origin, nature and development." American University Law Review, 1.

Koch, , "Cartels as instruments of international economic organizations." 8 Modern Law Review, 1945, 130.

Kopper, "The international regulation of cartels - current proposals." Virginia Law Review, 1954, volume 40, 1005.

Krumme, R.D., "International commodity agreements: purpose, policy, and procedure." George Washington Law Review, vol. 31, 1962-63, 784.

Mason, E., "The future of international cartels." Foreign Affairs, July 1944, 604.

Marasinghe, M.L., "A review of regional economic integration in Africa with particular reference to equatorial Africa." International and Comparative Law Quarterly, vol. 33, part 1, January 1984, 39.

McKinnon, R.I., "Futures markets, buffer stocks, and income stability for primary producers." Journal of political economy, vol. 65, 1967, 844.

McNicol, D., "The two price systems in the copper industry." Bell Journal of Economics, vol. 6, Spring 1975, 50.

Mingst, "Cooperation or Illusion: an examination of the intergovernmental Council of copper producing countries." International Organization, vol. 30, 1976, 275.

Moran, T.H., "Transnational strategies of protection and defense by multinational corporations: spreading the risk and raising the cost of nationalization in natural resources." International Organization, vol. 27, Spring 1973, 273.

Morgenstern, F., "Legality of international organizations." British Yearbook of international law, 1976-77, 256.

Ndulo, M., "Requirement of domestic participation in new mining ventures in Zambia." Comparative and International Law Journal of South Africa, vol. 10, 1977, 257.

O'Brien, R.C. and Helleiner, G.K., "The political economy of information in a changing international economic order." International Organization, vol. 34, no. 4, Autumn 1980, 445.

O'Keefe, P.J., "The United Nations and permanent sovereignty over natural resources." Journal of world trade law, vol. 8, no. 3, May-June 1974.

Olofin, S., "ECOWAS and the Lome convention: an experiment in complementary or conflicting customs union arrangement." Journal of Common market studies, vol. 16, 1977-78, 53.

Parkinson, F., "The United Nations integrated programme for commodities." Current legal problems, 1981, 259.

Pinder, J., "The Community and the developing countries: associates and outsiders." Journal of common market studies, 1973, no. 1, 53.

Pollard, D.E.E., "Conflict resolution in Producers' Associations." International and Comparative Law Quarterly, volume 31, 1982, 99.

Quattara, A.D., "Trade effects of the association of African countries with the EEC." IMF staff papers, volume XX, 1973, 499.

Roberts, A.D., "Notes towards a financial history of copper mining in Northern Rhodesia." Canadian Journal of African Studies, vol. 16, no. 2, 1982, 347.

Rock, C.A., "Regulatory control over the United States, Canadian, and United Kingdom futures markets." Business Lawyer, January 1982, vol. 37, no. 2, 613.

Romnicianu, M., "Management agreements: are they really necessary?" Enterprise, the INDECO Journal, 1st Quarter, 1972, 8.

Sabri, A.I., "The inadequacy and loss of legitimacy of the IMF." Development dialogue, number 2, 1980, 25.

Schachter, O., "Just prices in world markets: proposals de lege ferenda." 69 American Journal of International Law, 1975, 101.

Schwarzenberger, G., "The principles and standards of international economic law." Hague Academy of International Law, Recueil, vol. 117, 1966.

Seidman, A., "Prospects for Africa's exports." Journal of modern African studies, 1971, 9.

Slinn, P.E., "The Southern African Development Co-ordination Conference." The Yearbook of world affairs, 1984, 183.

Stevens, C., "The EEC and Africa: the end of a phase." Africa contemporary record, vol. XIV, 1981-82, p. A120.

Ustor, E., "The most favoured nation customs union exception." Journal of world trade law, vol. 15, 377.

Walker, H., "The international law of commodity agreements." Law and contemporary problems, vol. 28, Spring 1963, 392.

Wassermann, U., "International cocoa agreement 1980." Journal of world trade law, vol. 15, 1981, 149.

Wassermann, U., "UNCTAD: The Common Fund." Journal of world trade law, vol. 13, July-August 1979, 355.

Wassermann, U., "Commodities in UNCTAD: Preliminary meetings on copper." Journal of world trade law, vol. 11, 1977, 92.

X (Anonymous), "Three international commodity agreements." British Yearbook of International Law, vol. XXXV, 1959, 244.

Yusuf, A.A., "Differential and more favourable treatment: the GATT enabling clause." Journal of world trade law, vol. 14, 1980, 488.

Official publications of international organizations

CIPEC Secretariat, Report of the Executive Directors on the activities of CIPEC, 1970, CIPEC Document CO/97/71.

Jean d'Hainaut, A brief glimpse of CIPEC. CIPEC Document Info./251/79, March 1979.

ACP-EEC Council of Ministers, The Second ACP-EEC Convention, signed at Lome of 31st October 1979. Brussels, 1981 edition.

EC Commission information directorate general, The Lome convention - the stabilisation of export earnings. Doc. 95/75-202/X/75-E.

EC Commission, Lome Convention: Decision on STABEX transfers for 1976. July 1977.

United Nations department of public information, Towards a world economy that works, 1980.

UN General Assembly, Declaration on the establishment of a new international economic order and programme of action. UN Doc. A/9556.

UNCTAD Trade and Development Board, Report of the intergovernmental group of experts on copper. Doc. TD/B/IPC/COPPER/AC/1.

UNCTAD Trade and Development Board, An integrated programme for commodities. Report by the UNCTAD Secretariat. Doc. TD/B/C.1/194.

UNCTAD Trade and Development Board, Integrated programme for commodities: report by the Secretary General of UNCTAD. Doc. TD/B/C.1/166, December 9, 1974.

UNCTAD Trade and Development Board, Integrated programme for commodities: report of the second intergovernmental group of experts on copper. Docs. TD/B/IPC/COPPER/17 and TD/B/IPC/COPPER/AC.2/2, 25 June - 6th July 1979.

UNCTAD Trade and Development Board, The basic elements of an international copper agreement. Doc. TD/B/IPC/COPPER/13.

UNCTAD Trade and Development Board, Framework agreement for the Common Fund. Doc. TD/IPC/CONF./19, 21st March 1979.

UNCTAD Trade and Development Board, Report of the first preparatory meeting on copper. Doc. TD/B/IPC/COPPER/1.

UNCTAD Trade and Development Board, Report of the consultations on copper. Doc. TD/B/C.1/203.

United Nations Centre on Transnational Corporations, Transnational Corporations in the copper industry. New York 1981, Doc. ST/CTC/21.

Metal Marketing corporation of Zambia Ltd., Annual Report 1980.

CIPEC Secretariat, CIPEC Quarterly Review, tenth anniversary issue, 1st June 1977.

UNCTAD Trade and Development Board, Common Fund: Financial requirements; note by the UNCTAD Secretariat, Doc. TD/B/IPC/CF/L.2, 29th December 1976.

United Nations Secretariat, UN information note on joint ventures. UN Document A/Conf.62/C.1/L.19, 18th May 1977.